Supreme Court, U.S.
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In the Supreme Court of the United States

DEMOND L. STOVALL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA AFTER DENIAL OF THE WRIT OF CERTIORARI BY THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED:

Whether a resident of real property has standing under the Fourth Amendment to the United States Constitution to contest the forfeiture to the state of property found at his residence pursuant to the search of the residence and seizure of property found within the residence, out of plain-view.

LIST OF PARTIES

1. Judy Richardson, Claimant in the original proceeding, Appellee to the Georgia Court of Appeals, Applicant to the Georgia Supreme Court.
2. Demond L. Stovall, Claimant in the original proceeding, Appellee to the Georgia Court of Appeals, Applicant to the Georgia Supreme Court, Petitioner to this Honorable Court.
3. The State of Georgia, Plaintiff in the original proceeding, Appellant to the Georgia Court of Appeals, Respondent in the Georgia Supreme Court, Respondent to this Honorable Court.

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I. OPINIONS BELOW

The decision of the Supreme Court of the State of Georgia denying certiorari (App., 14)[1] is not reported, but can be found in Georgia Supreme Court case no. S06C0758.

The decision of the Court of Appeals of the State of Georgia(App., 5) is reported at 276 Ga.App. 784, and at 625 S.E.2d 52.

The decision of the Superior Court of Athens-Clarke County, State of Georgia (App., 1) is not reported, but can be found in the office of Clerk of Superior Court of Athens-Clarke County, case no. SU-03-CV-0899-SW.

II. JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on November 29, 2005 (App. 5). A Motion for Reconsideration was denied on December 12, 2005 (App., 13). The Supreme Court of the State of Georgia declined to grant the writ of certiorari on May 8, 2006. (App., 14). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

III. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment to the Constitution of the United States of America.:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

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[1]The abbreviation "App." refers to the Appendix to this petition.

describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment to the Constitution of the United States of America:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

3. The Fourteenth Amendment to the Constitution of the United States of America, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Official Code of Georgia § 16-13-49(a)(6)-(7), (o):

(a) As used in this Code section, the term:

(6) "Interest holder" means a secured party within the meaning of Code Section 11-9-102 or the beneficiary of a perfected encumbrance pertaining to an interest in property.

(7) "Owner" means a person, other than an interest holder, who has an interest in property and is in compliance with any statute requiring its recordation or reflection in public records in order to perfect the interest against a bona fide purchaser for value."

"(o) In rem proceedings.

(1) In actions in rem, the property which is the subject of the action shall be named as the defendant. The complaint shall be verified on oath or affirmation by a duly authorized agent of the state in a manner required by the laws of this state. Such complaint shall describe the property with reasonable particularity; state that it is located within the county or will be located within the county during the pendency of the action; state its present custodian; state the name of the owner or interest holder, if known; allege the essential elements of the violation which is claimed to exist; state the place of seizure, if the

property was seized; and conclude with a prayer of due process to enforce the forfeiture.

(2) A copy of the complaint and summons shall be served on any person known to be an owner or interest holder and any person who is in possession of the property.

(A) Service of the complaint and summons shall be as provided in subsections (a), (b), (c), and (e) of Code Section 9-11-4.

(B) If real property is the subject of the action or the owner or interest holder is unknown or resides out of the state or departs the state or cannot after due diligence be found within the state or conceals himself so as to avoid service, notice of the proceeding shall be published once a week for two successive weeks in the newspaper in which the sheriff's advertisements are published. Such publication shall be deemed notice to any and all persons having an interest in or right affected by such proceeding and from any sale of the property resulting therefrom, but shall not constitute notice to an interest holder unless that person is unknown or resides out of the state or departs the state or cannot after due diligence be found within the state or conceals himself to avoid service.

(C) If tangible property which has not been seized is the subject of the action,

the court may order the sheriff or another law enforcement officer to take possession of the property. If the character or situation of the property is such that the taking of actual possession is impracticable, the sheriff shall execute process by affixing a copy of the complaint and summons to the property in a conspicuous place and by leaving another copy of the complaint and summons with the person having possession or his agent. In cases involving a vessel or aircraft, the sheriff or other law enforcement officer is authorized to make a written request with the appropriate governmental agency not to permit the departure of such vessel or aircraft until notified by the sheriff or his deputy that the vessel or aircraft has been released.

(3) An owner of or interest holder in the property may file an answer asserting a claim against the property in the action in rem. Any such answer shall be filed within 30 days after the service of the summons and complaint. Where service is made by publication and personal service has not been made, an owner or interest holder shall file an answer within 30 days of the date of final publication. An answer must be verified by the owner or interest holder under penalty of perjury. In addition to complying with the general rules applicable to an

answer in civil actions, the answer must set forth:

(A) The caption of the proceedings as set forth in the complaint and the name of the claimant;

(B) The address at which the claimant will accept mail;

(C) The nature and extent of the claimant's interest in the property;

(D) The date, identity of transferor, and circumstances of the claimant's acquisition of the interest in the property;

(E) The specific provision of this Code section relied on in asserting that the property is not subject to forfeiture;

(F) All essential facts supporting each assertion; and

(G) The precise relief sought.

(4) If at the expiration of the period set forth in paragraph (3) of this subsection no answer has been filed, the court shall order the disposition of the seized property as provided for in this Code section.

(5) If an answer is filed, a hearing must be held within 60 days after service of the complaint unless continued for good cause and must be held by the court without a jury.

(6) An action in rem may be brought by the state in addition to or in lieu of any other in rem or in personam action brought pursuant to this title.

IV. STATEMENT OF THE CASE

A. Factual Background before the proceeding:

On 30 March 2003, law enforcement officers with the Barrow County Sheriff's Office to include Detective Ben Ewing conducted a search at 911 Justin Drive in Statham, Georgia. He ostensibly obtained a warrant on the same date from Sonya Davis, a part-time magistrate of Barrow County. Although this alleged warrant is nowhere to be found and was never proven to exist, there was an affidavit for search warrant made by Ewing to Davis for 911 Justin Drive. Portions of the information in the warrant were gained during an illegal stop and detention of Stovall shortly prior to this date.

Ewing and other officers made entry into 911 Justin Drive and located alleged contraband to allegedly include marijuana. Ewing determined that 911 Justin Drive belonged to Stovall and made application for and was issued arrest warrants for Demond Stovall on 31 March 2003.

Ewing, using the illegal search at 911 Justin Drive as his basis, then proceeded to 130 Chateau Terrace, Apartment 20 in Athens along with Athens-Clarke County officers to include Chris Fogel. This residence was found to belong to Stovall as was testified to by his mother and by Fogel, and as was eventually plead by the State. The officers unlawfully entered the apartment by retrieving a key from the apartment personnel. After entering apartment 20, they proceeded to search the residence and located alleged marijuana. The officers' search included breaking open a locked closet that was *secured with a lock* on the outside. A safe and a bag were located therein - these items were not in plain view.

These officers then again ostensibly obtained a warrant dated 21 March 2003 with an application for search warrant dated 31 march 2003 utilizing the evidence located from the earlier entry into the apartment, which was already tainted and hence this was all fruit of the poisonous tree, as

the first search would eventually be held to have been illegal A quantity of alleged marijuana was then located in the bag from the closet - which was not in plain view - along with the Defendant currency.

B. How the federal question was presented and procedural posture:

On May 7, 2003, the State of Georgia field a Complaint for Forfeiture in the Superior Court of Clarke County, State of Georgia. (R.4)[2]. Amongst other property, the Complaint sought the forfeiture of $10,720 in U.S. currency, seized during a search at 130 Chateau Terrace, Apartment 20, Athens, Clarke County, Georgia. (R.5). The State alleged that the property was subject to forfeiture under O.C.G.A. § 16-13-49. *Id.* The State also noted that possible owners and interest holders included the Petitioners here, and listed Demond L. Stovall as residing at the same address where the money was seized. (R.5-6).

Judy Richardson's[3] initial response was to file a Motion to Suppress Illegally Seized Evidence and a Motion for the Return of Property, file June 5, 2003, stating *inter alia* that the search was illegal. (R.13). Importantly, it also stated that the search violated the Claimant's Rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States. (R. 18). Attached to that Motion were documents relating to another search and seizure of property involving Mr. Stovall in Barrow County as well. (R.21-31). Judy Richardson also filed a verified Answer to the State's Complaint, filed June 5, 2003. (R.32). The hearing on the matter was rescheduled many times as

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[2]The R. abbreviation refers to the pages of the record prepared by the Superior Court of Athens-Clarke County which was sent to the Court of Appeals for the State of Georgia.

[3]Ms. Richardson was also a Claimant in the original case.

can be seen on the record. The State eventually obtained a continuance on July 17, 2003, further delaying the proceeding. (R.60). Ms. Richardson Amended the Motion to Suppress and for Return of Property on August 20, 2003, adding that the search warrants were not even issued by a magistrate as authorized by O.C.G.A. § 15-10-20. (R.70, 76).

Petitioner Demond Stovall was not served with process in the original forfeiture case until August 8, 2003 (R.69). After being served, Mr. Stovall filed a Motion to Suppress Evidence Illegally Seized and Motion for Return of Property on September 8, 2003.. (R. 78, App. 21). The Motion does state that Mr. Stovall was a resident of 130 Chateau Terrace, Apartment 20, Athens, Clarke County, Georgia. (R. 79, App. 21-22). The Motion also raised the issue that the search was illegal as fruit of the poisonous tree (R.80, App. 22-23), and importantly stated that the search and seizure violated Mr. Stovall's Rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United State. (R. 83, App.25).

Mr. Stovall filed a verified Answer and Claim to Complaint for Forfeiture on September 8, 2003 as well. (R. 86, App.28). Included in the Answer as a Defense that the "forfeiture is based in whole or in part on evidence seized in violation of the Claimant's rights under the Fourth, Fifth, and Sixth Amendment rights under the constitution of the United States." (R. 87, App. 29). The Claim also asserted that the property was seized in violation of the Claimant's Fourth, Fifth, and Fourteenth Amendment Rights under the Constitution of the United States. (R. 94, App. 30).

On September23, 2006, the Superior Court of Athens-Clarke County conducted a hearing in this case. In closing arguments, Petitioner's attorney once again raised

the issue of the illegal search (T. 166, App. 53)[4], and that the Defendant property itself in the proceeding *in rem* had been illegally seized (T. 165, App. 63-65). In other words, the illegality of the search under the Fourth Amendment was once again raised as an issue in this case. Indeed, even the trial Court Judge, the Honorable Judge David Sweat, expressed concern about the illegality of the search *sua sponte* (T. 167-68, App. 64-65). Judge Sweat also understood that the Claimant was contesting that the search had been illegal. Furthermore, the trial court specifically expressed concern regarding the legality of the search during the state's closing while discussing the standing issues surrounding Mr. Stovall. (T. 180-85, App. 65-71). Once again, the trial court itself, in addition to the Claimant, raised the standing issue in context with the search *sua sponte*. Furthermore, the brief of Claimant Demond Stovall following the hearing dealt extensively with the issue of the illegal search (R. 118-127, App. 40-49).

A few months passed, and the next significant procedural event was Mr. Stovall's Motion for Judgment filed January 7, 2004. (R.136) In this Motion, Mr. Stovall, through his attorney, showed that the Honorable Steve Jones in Athens-Clarke County granted a Motion to Suppress in his case (the criminal action against Mr. Stovall, *State of Georgia v. Demond Stovall*, Superior Court of Athens-Clarke County, Case No. SU-03-CR-1231-J), and that was res judicata in the Athens-Clarke County Case. The Honorable Judge Jones held that the only reason a warrant was issued for a search of Mr. Stovall's residence at 130 Chateau Terrace was due to contraband illegally found at 911 Justin Drive in Barrow County. (R.141, App. 15-20). The Judge

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[4]The T. abbreviation refers to pages from the Transcript of the September 23, 2006 hearing in the Superior Court of Athens-Clarke County, State of Georgia.

then found that the State failed to prove that the evidence obtained at 130 Chateau Terrace came about by means "sufficiently distinguishable to be purged of the primary taint." *Id.* Consequently, both searches were illegal.

In an Order issued on April 23, 2004, Honorable Judge David Sweat in the Superior Court of Athens-Clarke County found that both Claimants (Applicants here) had standing to contest the Complaint in forfeiture because each had established some property interest in the subject matter. (R.149, App. 1-4). The Court also found that both searches - that of 911 Justin Drive and of 130 Chateau Terrace were illegal. So for the second time, a trial Court found both searches to be illegal. The trial court also found that the Claimants "[had] standing to contest the Complaint in forfeiture, in that each has established at least some property interest in the subject matter of the condemnation proceeding." *Id.* The trial court order did NOT actually find as a matter of law or fact that Mr. Stovall was a bailee - merely that he had standing. Given the discussion regarding the search during the State's closing argument during the discussion regarding standing, referenced above, it is fair to infer that Judge Sweat found that Mr. Stovall had standing both has a bailee, and under the Fourth Amendment to the United States Constitution as a result of what had twice been held to be an illegal search.

After the ruling, the State timely filed for appeal to the Georgia Court of Appeals, arguing that the trial Court erred in finding that both Ms. Richardson and Mr. Stovall had standing to contest the forfeiture, and that the Court erred in finding that the search of the apartment at 130 Chateau Terrace was invalid. The Court of Appeals, in its opinion, found that Ms. Richardson and Mr. Stovall did not prove a property interest in the money because there was insufficient evidence to establish a bailor-bailee relationship

as to the money. *See State v. Richardson*, 276 Ga.App. 784, 625 S.E.2d 52 (2005).

The Court of Appeals never actually considered standing based on the illegal search in its opinion. In fact, the Court of Appeals claimed that the only basis upon which Stovall claimed an interest in the seized funds was as a bailee, and that he offered no evidence whatsoever to establish an interest. *Id.* at 788 Of course, Mr. Stovall had also contested the seizure based not merely on his status as a bailee, but also that the seizure violated his Fourth, Fifth, and Sixth Amendment Rights under the Constitution of the United States, and under Article I, Section I, paragraph XIII of the Georgia Constitution. (R.87, App. 29). He contested the search's legality in his Answer to the Complaint for forfeiture. Also, in his Answer, Mr. Stovall specifically denied the legality of the search, which would also put the state on notice of this potential grounds on which to contest the seizure. (R. 88, App. 29-30). Coupled with the reasonable reading of the trial Court's Order and hearing that Mr. Stovall was found to have standing both as a bailee and as a resident whose home and property was unlawfully searched and seized. Mr. Stovall did indeed rely on more than just his status as a bailee to contest the forfeiture: he also relied on the fact that his dwelling, where the money was found, and he resided, had been searched illegally.

Furthermore, Mr. Stovall did raise the issue of the illegal search and his standing as a result thereof to the Georgia Court of Appeals, as well:

> In addition, in the case of *Phillips v. State*, 167 Ga. 260, 305 S.E. 2d 918 (1983), the Court held that where a seizure was a direct result of an illegal intrusion into defendant's premises, there was no valid reason for seizure of the property and the evidence from

> the illegal seizure was inadmissible in the criminal trial.

(Appellee's Brief to the Court of Appeals at 13, App. 84).

Mr. Stovall did indeed, as can be seen from the brief, continue to raise the issue of his violation of his fourth amendment rights. Furthermore, he raised it in connection with his ability, his standing, to contest the forfeiture of property seized at his residence. What's more, since the entire file was sent to the Georgia Court of Appeals from the Superior Court, and Mr. Stovall had raised his constitutional defenses at every step of the proceeding in some form or another, he never waived his fourth amendment rights, as evidenced by the fact that he continued to argue about the search.

Mr. Stovall and Ms. Richardson also moved for reconsideration in the Georgia Court of Appeals on Dec. 8, 2005. In that Motion, Petitioner again stated that "Mr. Stovall has standing because he was the resident of the property, not merely because he was a bailee." Petitioner also once again brought up the fact of the illegal search, as well as the issue of his legitimate expectation of privacy in his own home. Unfortunately, on December 12, 2005, the Georgia Court of Appeals denied the Motion for Reconsideration. (App. 12)

After the decision of the Georgia Court of Appeals denying reconsideration, both Mr. Stovall and Ms. Richardson applied for the Writ of Certiorari from the Supreme Court of the State of Georgia on January 3, 2006. (App. 87-107). Petitioners enumerated three errors, including that the Georgia Court of Appeals erred by allowing money seized in an illegal search to be forfeited to the State, and not returned to the resident of the dwelling from which the money was seized. *Id.* at 92 Also pertinently, Petitioners stated the Georgia Court of Appeals erred when it declined to rule on the constitutionality of the

search and seizure before reaching the issue of whether or not there was a bailor-bailee relationship proven. *Id.* Unfortunately, the Georgia Supreme Court declined to take the case, offering no explanation. (App. 14).

V. ARGUMENT

> The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life.

United States v. Calandra, 414 U.S. 338, 354, 94 S.Ct. 613, 623, 38 L.Ed. 2d 561 (1974).

The Georgia Court of Appeals, and the Georgia Supreme Court by declining to grant certiorari themselves, have reached a holding that circumvents and violates this Court's well-established jurisprudence regarding the Fourth Amendment to the Constitution of the United States of America. Under the holding of the Georgia Court of Appeals, a state government may conduct an illegal search and seizure, taking anything they wish from a residence, and then keep that property by stating that if the resident cannot prove he "owns" a particular piece of personal property in his own residence - where he has a legitimate expectation of privacy - because he cannot prove standing to contest the forfeiture. This is even true, under the holding of the Georgia Court of Appeals, where the resident has been judicially determined to have a right to contest the search and seizure. In other words, under the holding of the Georgia Court of Appeals, by bringing a state civil forfeiture action, a state government can circumvent the Fourth Amendment rights - including a legitimate expectation of privacy in one's own residence - that are guaranteed by the Constitution to the United States. By refusing to reach the

issue of a search that was held illegal by two trial Courts, the Georgia Court of Appeals has deprived an individual of their standing under the Fourth Amendment to challenge an illegal search and seizure and the subsequent forfeiture that flowed therefrom. In this regard, the Georgia Court of Appeals has sought to avoid the jurisprudence of this High Court, and has also interpreted a Georgia statute in a way that would render it unconstitutional, since archaic notions of property law are no longer the sole nor even the main consideration under the Fourth Amendment.

Petitioner now asks this Honorable Court to decide the question presented, for if a resident has standing under the Fourth Amendment to contest a forfeiture based on an illegal search and seizure, then the Georgia Court of Appeals has committed Constitutional error by failing to reach the search at all in its opinion. Petitioner prays that this Honorable Court take up this question, and hold that the Fourth Amendment confers standing upon a resident of real property to contest the search of that property and the forfeiture of any property seized as a result thereof so that if no evidence other than what was taken during the illegal search and seizure is presented in support of the forfeiture, the property seized must be returned to the resident of the property from which it was taken.

A. Petitioner enjoyed a legitimate expectation of privacy in his residence, and his Fourth Amendment rights were invoked when the State of Georgia conducted a search of his residence.

The Fourth Amendment to the United States Constitution is made applicable to the states by the Fourteenth Amendment. *See Ker v. California*, 374 U.S. 23, 30, 83 S.Ct. 1632, 1628, 10 L.Ed. 2d 726 (1963). This Court has held that the Fourth Amendment protects property as well as privacy. *Soldal v. Cook County, Illinois, et. al.*, 506 U.S. 56, 62-63, 113 S.Ct. 538, 544, 121 L.Ed. 2d 450 (1992).

Soldal also held that "property rights are not the sole measure of Fourth Amendment violations," 506 U.S. at 64, clearing up any confusion that some may have felt after this Court's holdings in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967), *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 2d 782 (1967), and in *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed. 2d 325 (1974). The whole point of those cases, according to this Court in *Soldal*, was to show that property rights were not the only rights implicated by the Fourth Amendment.

Indeed, this High Court held in *Soldal*, drawing support from its previous holding in *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed. 2d 85 (1984):

> "the first Clause of the Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A 'seizure' of property occurs where there is some meaningful interference with an individual's possessory interests in that property."

466 U.S., at 113, 104 S.Ct., at 1656" *Soldal*, 506 U.S. at 63. Hence the first clause of the Fourth Amendment has two prongs: 1) a *search* prong that is invoked when "an expectation of privacy that society is prepared to consider reasonable is infringer, *Id.*, and 2) a *seizure* prong that deals with the possessory interest one has in property. Under *Soldal*, an invocation of either prong may lead to a fourth amendment violation - either a search *or* a seizure may trigger the amendment's protections. Indeed, *Soldal* even goes a step further, and holds that seizures of property are subject to the Fourth Amendment even when there is not a

search, and even property encountered in a public place can only be "seized" if the Fourth Amendment is satisfied. *Soldal*, 506 U.S. at 68.

After *Soldal*, this High Court further refined the wording of the test for the *search* prong of the fourth amendment analysis, holding that the extent to which the Fourth Amendment protects a person may depend upon where they are. *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S.Ct. 469, 473, 142 L.Ed.2d 373 (1998). *Carter* also restated that the capacity to claim fourth amendment protection depends upon whether or not the individual has a legitimate expectation of privacy in the invaded place, and is a personal right that is invoked by an individual. *Id.*, citing *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 425, 58 L.Ed. 2d 387 (1978). In any case, given the fact that the actual wording of the Fourth Amendment itself specifically mentions houses, there can be no doubt that the Fourth Amendment is at its strongest when a house is being searched - that is that our society recognizes a clear, legitimate privacy interest in one's own residence and a private room in that residence[5].

Also, the Fourth Amendment's application is not limited to criminal trials, and the violation of the Amendment occurs at the same time an unreasonable government intrusion occurs. *See United States v. Verdugo-Urquidez*, 292 U.S. 259, 264, 110 S.Ct. 1056, 1060, 108 L.Ed. 2d 222 (1980). This issue was also addressed briefly in *Soldal*:

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[5]This is also the case under Georgia law: "No expectation of privacy is more reasonable than that which one has in one's bedroom. From there, one may exclude the whole world, including one's children, *and especially the government.*" *Davis v. State*, 262 Ga. 578, 422 S.E.2d 546, at F.N.3 (1992) (emphasis added)..

> the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all. As we have observed on more than one occasion, *it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.*

Camara, 387 U.S., at 530, 87 S.Ct., at 1732; see also *O'Connor*, 480 U.S., at 715, 107 S.Ct., at 1496; *T.L.O.*, 469 U.S., at 335, 105 S.Ct., at 739." *Soldal*, 506 U.S. at 69 (emphasis added).

Clearly, the Fourth Amendment applies to protect a person's legitimate expectation of privacy against an unlawful search and his possessory interests against an unlawful seizure regardless of whether or not there is a civil proceeding, a criminal proceeding, or no proceeding at all. *See also Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed. 2d 735 (2002) (applying Fourth Amendment to school searches in non-criminal context). In other words, the Fourth Amendment gives standing to any individual to contest an unlawful search or seizure, and anything else that results from the search or seizure (including a civil forfeiture), once that individual shows that he had a legitimate expectation of privacy at the location of the search, *or* a possessory interest in the seized property.[6]

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[6]Of course, once this standing is conferred under the Fourth Amendment, the issue as to whether or not this ultimately leads to a return of property seized when standing is conferred in this matter is not discussed here, as it can not be properly brought before this Court at this time because the Georgia Court of Appeals never reached the issue of the

In the case *sub judice*, there can be no doubt that Petitioner, Mr. Stovall, enjoyed a legitimate, bona fide expectation of privacy in his home that was his castle, against all intrusion, including and especially against the government. The State of Georgia itself admitted *in judicio* that Mr. Stovall was the resident of 130 Chateau Terrace, Athens, Georgia. (R. 5-6). Hence, when the State of Georgia, through its law enforcement officers, undertook to search Mr. Stovall's property, that immediately raised the issue of a violation of his legitimate expectation of privacy against a search under the Fourth Amendment. *Accord Verdugo-Urquidez*, 292 U.S.at 264 (Fourth Amendment violation occurs at the same time the unreasonable government intrusion occurs); *Carter*, 525 U.S. 88 (legitimate expectation of privacy test); *Soldal*, 506 U.S. at 69. Hence, there can be no doubt that he had standing to contest the illegal search. It would seem to be highly anomalous if the Fourth Amendment gave him a cause of action under 42 U.S.C. § 1983[7] yet did not protect his rights so that he could have any property taken as a result of an unlawful search returned to his residence. In fact, this would be akin to stating that because the property was not forfeited through criminal charges in a criminal action, Mr. Stovall has no standing under the Fourth Amendment to contest the search in another action, in violation of this Court's prior holdings in *Camara*, 387 U.S., at 530, and *Soldal*, 506 U.S. at 69.

Mr. Stovall's right against unreasonable seizures was also implicated, and violated, in the case *sub judice*. Although it may be true that old notions of property law are

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legality of the search.

[7]Such an action has not been brought at this time; this reference is intended to refer to the fact pattern in *Soldal*.

no longer the sole driving force behind the Fourth Amendment, they are still a consideration when it comes to the seizure prong as a separate violation which confers standing to contest a search. *See generally Katz*, 389 U.S. 347; *Accord Soldal*, 506 U.S. at 63. The State of Georgia, by taking the Defendant currency from Mr. Stovall's personal residence, where he was in possession of everything therein, interfered with his right to possession of the Defendant currency found there.

Also, if the search and seizure in this case was illegal (has held by two trial Courts although erroneously not reached by the Georgia Court of Appeals), there is also an unavoidable implication of Mr. Stovall's Fifth Amendment Rights against taking without due compensation. At the very least, the implication of this Amendment heightens the importance of this issue, where the two amendments are working in tandem, as they are here.

There can be no doubt that Mr. Stovall's Fourth Amendment Rights against unreasonable search and seizure were invoked. As Petitioner now shows, the Fourth Amendment therefore conferred standing upon him to contest a forfeiture on the grounds that the search of his residence and seizure of property there was unlawful, and that by dodging the issue of the search, the Georgia Court of Appeals has unconstitutionally circumvented Mr. Stovall's rights in that regard.

B. Petitioner has standing to contest the search of his residence and the seizure of the Defendant currency under the Fourth Amendment, and the Georgia Court of Appeals therefore deprived him of his Fourth Amendment Rights by failing to reach the issue of the search.

Irregardless of whether or not the Georgia Court of Appeals would hold the search unconstitutional on remand[8], Mr. Stovall's Fourth Amendment rights were implicated the *instant* the state undertook to do a search and seizure.[9] *Verdugo-Urquidez*, 292 U.S.at 264. Of course, as shown above, Mr. Stovall did have a legitimate expectation of privacy in his residence.[10] Therefore, there can be no doubt that Mr. Stovall has standing to contest the illegal search of his residence.

Despite the fact that Mr. Stovall had clear standing to contest the illegal search of his residence under this Honorable Court's Fourth Amendment jurisprudence, the Georgia Court of Appeals decided to circumvent this fact by holding that, despite that fact that the issue of the illegal search had been raised every step along the way, and despite the fact that the trial Court raised the issue *sua sponte*, the Petitioner could only have had standing as a bailee, and did not have standing in that manner. The Georgia Court of Appeals has used the standing requirement of forfeiture

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[8]They likely would have little choice, however, since the original search leading to this one was held unlawful, and a criminal trial court also held that this search was illegal, and that decision has not been overturned. Furthermore, under Georgia law, if the search is illegal, the property seized in the illegal search must be returned. *See Curry v. State*, 271 Ga. App. 672, 677, 610 S.E.2d 635, 640 (2005).

[9]The implication and violation of these rights are of course two separate issues - of course once the rights are implicated, Mr. Stovall, the resident had standing to contest the search, and therefore the forfeiture.

[10]As distinguished from *Katz*, where there was a plain-view doctrine issue - here the legitimate expectation of privacy was in Mr. Stovall's residence itself, and since no evidence from the search and seizure was admissible, as a matter of fact there is no evidence of any contraband at Mr. Stovall's residence. This of course also distinguishes *Jacobsen*, as no test results would be admissible either, because nothing found in the residence was admissible

under Georgia law to circumvent the Fourth Amendment, incorporated by the Fourteenth Amendment, to the United States Constitution.

There can be no doubt whatsoever that Petitioner has raised his Fourth Amendment rights every step of the way. Also, as this Honorable Court's own cases point out, when an individual has a legitimate expectation of privacy, his Fourth Amendment right against unreasonable searches is implicated, and he may contest that search and those actions. *Accord Carter*, 525 U.S. 83; *Soldal*, 506 U.S. 56. This Fourth Amendment right is not limited to times when an individual is suspected of criminal activity, and applies to all persons covered by the Amendment at all times when they have a legitimate expectation of privacy. *See Verdugo-Urquidez*, 292 U.S.at 264; *See generally Board of Education of Independent School District No. 92 of Pottawatomie County*, 536 U.S. 822. Therefore, it's protections must also apply in a civil forfeiture action *in rem* to protect a resident against unreasonable searches of his home. To hold otherwise would indeed be anomalous, and contrary to the very purpose of the Fourth Amendment as stated by this Honorable Court in *Calandra*, 414 U.S. at 354.

Mr. Stovall had a right to be secure in his home against unreasonable searches. The Georgia Court of Appeals has circumvented that right by essentially holding that the Fourth Amendment does not apply to grant standing in forfeiture cases. What's worse, the Georgia Court of Appeals did so by simply ignoring the issue. Of course, this is contrary to the jurisprudence of this Honorable Court as shown above. Under the holding of the Georgia Court of Appeals, it is possible that where a mother buys a gift, such as a laptop computer, for her son [11], and the son keeps the

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[11] And the son of course would not be a bailee, nor the mother a bailor

laptop computer out of view of the public, the state could come in, take that computer, and *no one would have standing to contest the forfeiture of that money.*[12] The mother would have a mere equitable interest, and the son could not show that he truly "owned" the laptop since it would probably be on his mother's credit card- all he would have would be a mere possessory interest not as a bailee[13], and yet the mother under Georgia law would be held to have only an equitable interest. In other words, it is entirely possible that neither party could contest the forfeiture on these facts because of a lack of standing, *unless* the son has standing under the Fourth Amendment due to the search of his residence.

The above hypothetical is not dissimilar from this case. On the record, considering the admissible evidence, money was taken from a location not in plain view that was in the private residence of Petitioner, where that money came from some outside source, and Petitioner has been effectively denied his right to contest the search and anything from that search. Under *Soldal*, it would appear that petitioner can bring a § 1983 action, but under the holding of the Georgia Court of Appeals, the property found and seized in the search can not be returned to Petitioner. This truly is "anomalous," as it applies a state forfeiture statute in a manner that contradicts and circumvents the law under the Fourth Amendment.

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[12]This would seem to be especially true in Georgia, which has decided a line of law that is important to cite at this point in order to understand the magnitude of the new Constitutional loophole created by the Georgia Court of Appeals. In Georgia, an equitable interest has been held insufficient to challenge forfeiture. *McFarley v. State*, 268 Ga. App. 621, 602 S.E.2d 341 (2004). Hence, the mother can not challenge the forfeiture.

[13]As the Georgia Court of Appeals' holding in this case has shown, a mere possessory interest when not a bailee is not enough.

C. The application by the Georgia Court of Appeals of O.C.G.A. § 16-13-49 in this case works a violation of the Fourth Amendment, and hence the way the statute has been applied in this case is unconstitutional:

O.C.G.A. § 16-13-49 requires, in order to have standing to contest a forfeiture, that the person contesting the forfeiture be an "owner" or an "interest holder." An "owner" is defined as "a person, other than an interest holder, who has an interest in property and is in compliance with any statute requiring its recordation or reflection in public records in order to perfect the interest against a bona fide purchaser for value." O.C.G.A. § 16-13-49(a)(7). An "interest holder" is defined as "a secured party within the meaning of Code Section 11-9-102 or the beneficiary of a perfected encumbrance pertaining to an interest in property." O.C.G.A. § 16-13-49(a)(6).[14]

In the case *sub judice*, the Georgia Court of Appeals has essentially applied this statute to mean that the resident of a home - despite a legitimate expectation of privacy - can not have standing to contest a forfeiture unless he takes a second step and then also proves that he has some kind of interest in the property seized. But even if we were to concede for the sake of argument that Mr. Stovall did not have a possessory interest in the seized property, the search that lead to the seizure still vested a Fourth Amendment Right to him to contest the search. The Georgia Court of Appeals has used this statute as a shield to prevent Mr. Stovall from contesting the search in a civil proceeding. Mr. Stovall has standing under *Rakas*, *Sodlal*, and *Carter*, due to his legitimate expectation of privacy, to contest the illegal

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[14]It may be that the statute itself is unconstitutional in this context, as it forces standing to be based upon old notions of property law.

search of his property in any proceeding that is brought as a result of that search. This Fourth Amendment standing supercedes any state-law requirement due to the incorporation of the Fourth Amendment by the Fourteenth Amendment.

To look at this another way, the instant the state searched Mr. Stovall's residence (and hence implicated the Fourth Amendment) the state literally conferred standing upon Mr. Stovall to contest their actions from that moment forward in any proceeding that resulted, because under the Fourth Amendment to the Federal Constitution Mr. Stovall had a legitimate expectation of privacy in his own home. However, the Georgia Court of Appeals, in declining to reach the issue of the search when it was presented on appeal (and after the Trial Court had considered the search at the behest of counsel and *sua sponte* , and after the search was raised by Petitioner at that and all levels) effectively used O.C.G.A. § 16-13-49's standing requirements as a substitute for the Fourth Amendment's standing to contest the search. In other words, the Georgia Court of Appeals only really ever considered the secondary issue of the seizure and the possessory interest - it avoided considering the search which preceded it, even though that issue had been raised. In doing so, the Georgia Court of Appeals has run afoul of the Fourth Amendment to the Constitution of the United States.

VI. CONCLUSION

The Georgia Court of Appeals, and the Georgia Supreme Court by denying certiorari, have circumvented Mr. Stovall's Fourth Amendment Standing to contest the unreasonable search of his residence and the seizure of property therefrom by refusing to even discuss the search. For all of the above reasons, the Judgment of the Georgia Court of Appeals must be reversed and the case remanded to be considered in light of the fact that the Fourth Amendment

to the United States Constitution confers standing upon a resident of a dwelling, abode, or house to contest the search by the state of his residence, and any proceedings that arise therefrom, including a civil forfeiture.

October 5, 2006

Respectfully Submitted,
/s/ James W. Smith
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IN THE SUPERIOR COURT OF ATHENS-CLARKE COUNTY

STATE OF GEORGIA

[stamped filed April 26, 2004, 3:44 p.m.]

STATE OF GEORGIA	*	
Plaintff,	*	
	*	
v.	*	
Ten Thousand Seven	*	
Hundred Twenty Dollars	*	
($10,720.00) in U.S.	*	
Currency; One (1) TCL Sport	*	CIVIL ACTION NO.
Gear Duffel Bag;One (1)	*	
Bryco "Jennings Nine"	*	SU-03-CV-0899SW
9mm Semi-automatic	*	
Handgun, Serial No.144	*	
828, with Magazine	*	
containing 9mm Ammunition;	*	
One (1) Sentry Safe, Model	*	
S3 1 10, Serial No.	*	
A-993454 1 ;One (1)	*	
Gram Precision Electronic	*	
Scale; Onc (1) Mossberg	*	
12 Gauge Shotgun, Model	*	
500A, Serial No. P3 86 194,	*	
with Sling, Locked Trigger	*	
Guard and Key for Trigger	*	
Lock,	*	
Defendants in Rem.	*	

ORDER ON FORFEITURE

The State of Georgia has brought the

above-captioned forfeiture action pursuant to OCGA §16-13-49 against the property identified herein as Defendants in Rem. Judy Richardson and DeMond Stovall have each filed an Answer and Claim. Stovall's asserts that he was a bailee of the claimed property for Richardson. Both claim an interest in the $10,720.[1] Both Richardson and Stovall filed Motions to Suppress Evidence Illegally Seized, Motions for Return of
Property as amended, and Motions to Dismiss Complaint for Forfeiture and to Return Property. It also contains Claimant Stovall's Motion to Suppress Evidence Illegally Seized and Motion for Return of Property, and Motion for Judgment.

No one has filed any claim as to the items of personal property made I defendants in rem in the action.

FINDINGS OF FACT

The Court finds as follows: On March 30, 2003, the Magistrate of Barrow County issued a search warrant for the premises of 91 1 Justin Drive, Statham, on the affidavits of Investigator Ewing and Deputy White of the Barrow County Sheriffs Office. Investigator Ewing affied that Detective Fogal of the Athens-Clarke County Police Department had previously advised the Barrow County Sheriffs Office Narcotics Division that he suspected DeMond Stovall of conducting a marijuana growing operation at 911 Justin Drive, and that DeMond Stovall had been followed from a retail distributor of products commonly used in marijuana cultivation. Investigator Ewing affied that he received information from Deputy White and attached Deputy White's affidavit. Deputy White affied that he had conducted surveillance on 911 Justin Drive, and on March 30, 2003, he

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[1] Later pleadings, and Richardson and Stovall's Answers and Claims refer to $10,723 as the amount of currency. The Court's order will apply to the currency, whichever amount is correct.

observed an individual later identified as DeMond Stovall exit the house to place a white plastic bag in the trunk of a vehicle Deputy White had determined was registered to Judy Richardson. Shortly thereafter Deputy White observed DeMond Stovall leave the location driving that vehicle. Deputy White followed the vehicle, saw it cross the double yellow line on the roadway on three occasions, and initiated a stop. DeMond Stovall appeared very nervous, and in response to questioning stated that he had just left the residence of a friend and that his criminal history contained only one arrest for a battery charge. Deputy White conducted a background check and determined that DeMond Stovall had several arrests and was currently on probation. When DeMond Stovall refused Deputy White's request to search the vehicle, Deputy White released DeMond Stovall and returned to 911 Justin Drive. At that location he was informed by an individual mowing the lawn that DeMond Stovall did reside there. The residence was unoccupied and secured. Deputy White spoke to three neighbors, who stated that the residence received traffic in the middle of the night and that on some nights there was a very bright "glowing light" coming from inside.

That same day, Investigator Ewing executed the search warrant for 911 Justin Drive, and items of property were seized. On March 31, 2003, the Magistrate of Barrow County issued two arrest warrants for DeMond Stovall at the address of 130 Chateau Terrace, Apt. 20, Athens, for the offenses of possession of a controlled substance with the intent to distribute and manufacturing marijuana. Claimant Stovall was arrested, and a search warrant for the apartment at 130 Chateau Terrace was issued. A search was conducted and the property identified herein as Defendants in Rem was seized.

CONCLUSIONS OF LAW

The Court finds that both Claimants have standing to

contest the Complaint in Forfeiture, in that each has established at least some property interest in the subject matter of the condemnation proceeding. Belvin v. State, 258 Ga. App. 790, 791 (2002). Considering the totality of the circumstances, the Court concludes that there was an insufficient probable cause from the traffic stop to issue a warrant to search the house at 911 Justin Drive. State v. Porter, 167 Ga. App. 293 (1983). The subsequent arrest warrants which led to the search warrant for the apartment at 130 Chateau Terrace in which the subject property was seized were not sufficiently attenuated by time, intervening circumstances and purpose from the tainted search at 911 Justin Drive, and the search was therefore invalid. Donner v. State, 191 Ga. App. 58 (1989); see also Boatright v. State, 225 Ga. App. 181 (1997).

As to Claimant Richardson's motion for dismissal and in particular Claimant Stovall's Motion for Judgment, the Court notes that an acquittal or dismissal in a criminal proceedings does not preclude civil proceedings under the article in which OCGA § 16-13-49 is found.

The Court enters judgment in accordance with its ruling herein. The State is directed to RETURN the $10,720 in currency to Claimants Stovall and Richardson. Defendants in rem other than the currency are hereby forfeited to the State of Georgia. The State of Georgia is directed take further action on that property in accordance with OCGA § 16-13-49 and other applicable law.

This 23rd day of April, 2004.

/s/ David R. Sweat
DAVID R. SWEAT, Judge
Superior Courts, Western
Judicial Circuit

Mr. Anthony C. Lee Hing, Special Assistant District Attorney, appeared for the State
Mr. James W. Smith, Esq. appeared for the Claimants

IN THE COURT OF APPEALS OF GEORGIA

276 Ga.App. 784, 625 S.E.2d 52
STATE of Georgia
v.
RICHARDSON et al.
No. A05A0867.
Court of Appeals of Georgia.
Nov. 29, 2005.
Reconsideration Denied Dec. 12, 2005.

Kenneth W. Mauldin, District Attorney, Anthony Courtney Lee Hing, Assistant District Attorney, for appellant.
James W. Smith, Athens, for Appellees.
BERNES, Judge.

The State of Georgia appeals from the trial court's order holding that $10,720 in United States currency was not subject to forfeiture and should be returned to Demond L. Stovall and his mother, Judy Richardson. The State contends that the trial court erred by holding (1) that Stovall and Richardson had standing as claimants to contest the forfeiture and (2) that the search of the residence where the funds were seized was illegal. We agree with the State that Stovall and Richardson lacked standing to contest the forfeiture because they failed to meet their burden of establishing an ownership interest in the currency seized by law enforcement. Accordingly, we reverse.

The evidence reflects that on March 31, 2003, the Magistrate Court of Barrow County issued two arrest warrants for Stovall for the offenses of possession of a controlled substance with intent to distribute and manufacturing marijuana. The arrest warrants were predicated on drug-related evidence seized the previous day

during the search of a private residence located in Barrow County. The arrest warrants listed Stovall's home address as 130 Chateau Terrace, Apartment 20, which was located in Athens–Clarke County. Stovall occupied the apartment with at least one other resident, Tyvone Lee Barnes.

Later that day, several law enforcement officers with the Athens–Clarke County Police Department and the Narcotics Division of the Barrow County Sheriff's Office executed the arrest warrants at 130 Chateau Terrace. After obtaining a key from the landlord and knocking on the apartment door, the officers entered the apartment after receiving no response. They did not find Stovall or Barnes inside the apartment. While in the apartment, one of the officers smelled what he believed was marijuana and observed in plain view what appeared to be a marijuana cigarette and rolling papers.

Thereafter, a search warrant was obtained for the apartment from the Magistrate Court of Athens–Clarke County. During the ensuing search, the officers seized, among other things, $140 in United States currency from the master bedroom. The officers also seized from a closet in a separate bedroom $10,580 in United States currency and a duffel bag containing separate smaller bags of a material that later tested positive as marijuana. The $10,580 was found in a safe located in the closet and was divided into various denominations of $10 bills, $20 bills, $50 bills, and $100 bills.

The State subsequently filed a civil in rem complaint for forfeiture under OCGA § 16–13–49 in the Superior Court of Athens–Clarke County. Among other items, the State sought the forfeiture of the $10,720 in currency seized during the search of 130 Chateau Terrace. The State contended that
the currency was subject to forfeiture because it was 'directly or indirectly used or intended for use . . . to

facilitate [the controlled substance] violation[s] or [was] proceeds derived or realized therefrom'' (OCGA § 16–13–49(d)(2)), or because it was found in close proximity to the seized marijuana or other property subject to forfeiture (OCGA § 16–13–49(d)(6)).

Stovall and his mother Richardson both filed verified answers asserting an ownership interest in the seized cash.[1] They both alleged that Richardson had entrusted the seized funds to her son Stovall to spend on the rental, tuition fees, and supplies needed for the college education of her other son, Dominique Stovall. Stovall and Richardson further alleged that the seized cash was fruit of the poisonous tree from a prior allegedly unconstitutional search conducted in Barrow County.

The trial court subsequently conducted a bench trial on the State's forfeiture claims pursuant to OCGA § 16–13–49(o)(5). After hearing all the evidence, the trial court entered its order holding that Stovall and Richardson had standing to contest the forfeiture because they were bailor and bailee, respectively, of the seized cash. *See Lawrence v. State of Ga.*, 231 Ga.App. 739, 740, 501 S.E.2d 254 (1998) (proof of bailor-bailee relationship is sufficient to confer standing to contest a forfeiture). The trial court also concluded that the search of 130 Chateau Terrace was constitutionally invalid. Accordingly, the trial court ordered that the seized cash be returned to Stovall and Richardson.

1. The State contends that the trial court erred in

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[1]In its order entered after the condemnation hearing, the trial court noted that no one had filed a claim to recovery any of the other property seized by the law enforcement officers. As such, the trial court ruled that all items other than the seized cash were forfeited to the State. Neither Stovall nor Richardson appeal that ruling.

finding that Stovall and Richardson had standing as claimants to contest the forfeiture of the $10,720 in United States currency seized from 130 Chateau Terrace. We agree.

> It is clear that to have standing to contest a forfeiture a party must have at least some property interest in the subject matter of the condemnation proceeding. Forfeiture is an in rem proceeding, and the statutory procedure must be strictly construed. The burden is on the claimant to establish her claim; once she does, she is able to contest the forfeiture to the state of the property.

(Citations, punctuation, and footnote omitted.) *McFarley v. State of Ga.*, 268 Ga.App. 621, 622, 602 S.E.2d 341 (2004). See also *Hill v. State of Ga.*, 178 Ga.App. 563, 565(2), 343 S.E.2d 776 (1986). "If a person has no interest in the property, she cannot very well be heard to complain of its forfeiture; as a stranger to it, she is a mere member of the public volunteering to challenge the entitlement of the state to the property." (Footnote omitted.) *Belvin v. State of Ga.*, 258 Ga.App. 790, 791, 575 S.E.2d 707 (2002).

At the forfeiture hearing, Richardson testified that she had withdrawn $15,000 from her (401k) plan in order to pay for the college education and related expenses incurred by her younger son, Dominique Walker. According to Richardson, she gave the $15,000 to her older son Stovall with instructions for him to pay Dominique's school-related expenses because she had "a serious gambling habit and . . . did not trust [herself]" with it and because Dominique himself was "careless with money." Richardson testified that she gave the funds to Stovall in the form of a check in the amount of $9,000 and cash in the amount of $6,000 in

April 2002, when Stovall was still living at home with her. Richardson further related that Stovall had placed the money she gave him in a small safe which Stovall later took with him when he moved to 130 Chateau Terrace.

Based on this testimony, the trial court was entitled to conclude that Richardson had given $15,000 to Stovall in April 2002 in order for him to spend on the school-related expenses of Dominique. However, there was no testimony or evidence presented at the forfeiture hearing showing that the $10,720 in cash seized by law enforcement approximately 12 months later was a portion of the same monies that Richardson had given to Stovall in the form of a check and cash.

Richardson herself lacked personal knowledge concerning the origin of the specific cash seized at 130 Chateau Terrace. She did not live there and obviously did not have personal possession of the seized cash. Furthermore,
Richardson testified that she had not seen the safe where much of the cash was seized for several months and had not looked in the safe at any time during 2003. Therefore, she lacked personal knowledge of how much money had been placed in or taken out of the safe during that time, or even whose money was being kept in the safe at that point. Indeed, Richardson testified that the last time she saw the safe it was not in Stovall's bedroom in the apartment but was in another bedroom that came to be occupied by one of Stovall's roommates. Accordingly, even though Richardson could testify about how she gave money to Stovall for Dominique's school-related expenses, she was not competent to testify about the origin of the specific money located in the apartment at the time of its seizure. The link between the funds had to be proven in some other fashion.

However, Stovall himself did not testify at the

forfeiture proceeding.[2] Nor did Stovall or Richardson introduce any other testimonial or documentary evidence to establish a connection between the funds. Thus, the link between the $15,000 allegedly given to Stovall by Richardson in April 2002 and the $10,720 seized from Stovall's apartment in late March 2003 was left to mere speculation and conjecture. Under these circumstances, there was no evidence establishing that Richardson had a cognizable property interest in the seized funds as a bailor, and so we conclude that the trial court erred in finding that Richardson had standing as a claimant to contest the seizure of the funds. *See Belvin*, 258 Ga.App. at 791–792, 575 S.E.2d 707 (claimant lacked standing as bailor to contest forfeiture when she failed to prove existence of bailor-bailee relationship).[3]

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[2]In his verified answer, Stovall did allege that the funds seized by law enforcement were a portion of the cash and check previously given to him by his mother for his brother's education. However, Stovall never attempted to introduce his verified answer into evidence at the bench trial in the forfeiture action. Moreover, a pleading that meets all of the requirements for being verified may be treated as the equivalent of an affidavit, *see Foskey v. Smith*, 159 Ga.App. 163, 164, 283 S.E.2d 33 (1981), but an affidavit constitutes nonprobative hearsay and is inadmissible at a bench trial absent a stipulation between the parties or proof that a hearsay exception applies. *See generally Rokowski v. Gilbert*, 275 Ga.App. 305, 315(9), 620 S.E.2d 509 (2005). *See also Hill*, 178 Ga.App. at 565(2), 343 S.E.2d 776 (previously filed affidavit did not constitute "evidence in the hearing on the [forfeiture] claim").

[3]Richardson also raises the alternative argument that this case should have been dismissed and the funds returned to her based solely on the verified pleadings because no hearing was set for and occurred within 60 days of when she served her verified answer. "In a civil forfeiture action, when a timely and sufficient answer has been filed, 'a hearing must be held within 60 days after service of the complaint unless continued for good cause.' " *Mitchell v. State of Ga.*, 255 Ga.App. 507, 509, 566

We likewise conclude that the trial court erred in finding that Stovall had standing as a claimant to contest the seizure of the funds. The only basis upon which Stovall claimed an interest in the seized funds was as a bailee, a claim predicated on the contention that the seized funds were a portion of the check and cash initially provided to him by Richardson for the school-related expenses of Dominique. Because that factual predicate was never proven, Stovall's claim to an interest in the seized funds as a bailee likewise went unproven. Stovall "offered no evidence whatsoever and thus established no right to complain of the forfeiture. The burden was on him to establish his claim." (Citation omitted.) *Hill*, 178 Ga.App. at 565(2), 343 S.E.2d 776.[4]

S.E.2d 24 (2002), quoting OCGA § 16–13–49(o)(5). "A motion for a continuance of the hearing is addressed to the sound discretion of the trial judge, and in the absence of a clear showing to the contrary, it will be presumed that such discretion was not abused." (Citations and punctuation omitted.) *State of Ga. v. Gonzales*, 213 Ga.App. 661, 662, 445 S.E.2d 808 (1994). The record reflects that Richardson filed her verified answer on June 5, 2003, and a hearing on all matters in the forfeiture action was originally set for July 31, 2003, within the 60-day period. Prior to the July 31 hearing date, the State moved for a continuance because it had been unable to successfully serve Stovall with a copy of the in rem complaint and summons. The State wanted to have more time to perfect service upon Stovall so that one forfeiture proceeding could be held that resolved the matter as to all potential claimants of the seized property. The trial court granted a continuance and reset the hearing for September 15, 2003, based on its conclusion that the State had shown good cause for a continuance. We find no abuse of discretion by the trial court in granting the continuance. *Cf. Blanks v. State of Ga.*, 240 Ga.App. 175, 177(1), 522 S.E.2d 770 (1999) (trial court did not abuse its discretion by granting continuance on ground that witness needed by the State was not available on date of scheduled hearing). Hence, we find Richardson's argument unpersuasive.

[4]We point out that in order to make out its prima facie case for forfeiture, the State was not required to present evidence demonstrating that

Therefore, the trial court also erred in finding that Stovall had standing to contest the forfeiture of the seized funds. *Cf. Bohannon v. State*, 251 Ga.App. 771, 772–773(1), 555 S.E.2d 112 (2001) (defendant lacked standing to challenge constitutionality of search when only alleged basis for standing was existence of bailor-bailee relationship, and defendant failed to present evidence showing he was bailee).

2. In light of our disposition of Division 1, we need not reach the State's remaining enumeration of error.

Judgment reversed.

BLACKBURN, P.J., and MILLER, J., concur.

Court of Appeals
of the State of Georgia

ATLANTA, DECEMBER 12, 2005

Stovall owned the monies seized from the safe. It was sufficient for the State to show that the monies were found in close proximity to the seized marijuana or other property subject to forfeiture. See OCGA § 16–13–49(d)(6).

The Court of Appeals passed the following order

Case No. A05A0867
STATE OF GEORGIA V. JUDY RICHARDSON ET AL

Upon consideration of 'the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Ofice, Atlanta DEC 12. 2005

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

/s/ William R. Martin III

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Date: May 08, 2006

Scott Norman Davis
260 College Avenue
Athens, GA 30601

Case No. S06C0758

JUDY RICHARDSON et al . v. STATE of GEORGIA
COURT OF APPEALS CASE NO. A05A0867
The Supreme Court today denied the petition for certiorari in this case.
All the Justices concur.

Sherie M. Welch, Clerk

IN THE SUPERIOR COURT OF ATHENS-CLARKE COUNTY

STATE OF GEORGIA

[stamped filed November 21, 2003 11:23 a.m.]

STATE OF GEORGIA	*	
	*	
v.	*	
	*	CASE NO.:
DEMOND L. STOVALL,	*	SU-03-CR-1231-J
	*	
Defendant.	*	

ORDER

Findings of Fact

On October 3, 2003, the Defendant filed a Motion to Suppress Evidence Illegally Seized. In his Motion, the Defendant argued that officers from the Barrow County Sheriffs Office and officers from the Athens-Clarke County Police Department conducted an illegal search at 130 Chateau Terrace, Apartment 20, Athens-Clarke County, Georgia. The Defendant claimed that the residence was searched without a valid search warrant, probable cause, reasonable articulable suspicion, consent, and exigent circumstances.

A review of the evidence presented at the suppression hearing shows that on March 31. 2003, Athens-Clarke County Detective Chris Fogal obtained a search warrant for 130 Chateau Terrace. In his Affidavit and Application for a Search Warrant Detective Fogal stated that earlier that day, Barrow County Investigator Ben Ewing advised Detective

Fogal that as a result of a search executed upon a Barrow County residence that was maintained by the Defendant at 911 Justin Drive, Statham Georgia. he had obtained two arrest warrants for the Defendant, one for manufacturing marijuana and one for possession of marijuana with intent to distribute. Detective Fogal stated that he advised Investigator Ewing that the Defendant maintained an apartment in Athens, Georgia at 130 Chateau Terrace and as a result: Investigator Ewing listed the 130 Chateau Terrace address on the arrest warrant. Detective Fogal also stated that he and other Barrow County investigators went to 130 Chateau Terrace to execute the arrest warrant Detective Fogal stated that after knocking on the door and not obtaining a response, he used a key that he had obtained from maintenance to gain access to the apartment.

While in the apartment. Detective Fogal stated that he saw a marijuana cigarette on the dresser in the master bedroom and also saw drug paraphernalia in the apartment. After seeing these items, Detective Fogal went to Athens-Clarke County Magistrate Court Judge Charles Auslander to obtain a search warrant for 130 Chateau Terrace.

Conclusions of Law

Having read and considered the Defendant's Motion to Suppress Evidence Illegally Seized and after hearing evidence and argument of Counsel, the Court hereby GRANTS the Defendant's Motion.

The Court finds that in order for the March 31 , 2003 search of the 130 Chateau Terrace residence to be valid, the Court must first determine if the March 30,2003 Barrow County search of 911 Justin Drive, in Statham, Georgia, and resulting arrest warrants were valid and issued upon sufficient probable cause. See O.C.G.A. § 17-5-21 (Probable cause is required for issuance of a search warrant.). See also State v. Stephens, 252 Ga. 181, 184 (1984) (holding that

probable cause exists where there is a fair probability that contraband or evidence of a crime will be found in a particular place).

A review of the Bamw County search warrant shows that the facts in the warrant relevant to the probable cause determination are as follows: (I). Athens-Clarke County Detective Chris Fogal advised Barrow County investigator Ben Ewing that he had reason to suspect that the Defendant was involved in the cultivation of marijuana at 911 Justin Drive because he followed the Defendant from Atlantis Hydroponics of Athens, a retail distributor of products commonly used in the cultivation of marijuana; (2.) on March 30, 2003: Barrow County Deputy Sheriff's Deputy David White observed the Defendant leave 91 1 Justin Drive and followed the Defendant's vehicle for approximately three miles and witnessed the vehicle cross the double yellow line on three separate occasions, then initiated a traffic stop: (3.) during the traffic stop, the Defendant appeared very nervous and when asked, did not tell the truth about who lived at 911 Justin Drive and about his criminal history; (4.) during the traffic stop, when asked, the Defendant refused to consent to a search of his vehicle (5.) Deputy White spoke with three of the Defendant's neighbors who stated that they were unsure about who lives at 911 Justin Drive and that there was a lot of traffic in and out of the residence in the middle of the night; and (6.) two of the neighbors stated that on some nights. there was a very bright light coming From the inside of the residence and also referred to the light as a "glowing light."

After considering the totality of the circumstances and after applying a deferential standard of review, the Court finds that base don the facts enumerated above, the Barrow County magistrate did not have a substantial basis for concluding that probable caused existed at the time of the issuance of the search warrant. See Gibson v. State, 223 Ga.

App. 103, 104 (1 996) ("In determining whether probable cause supported issuance of a search warrant, a 'totality of the
circumstances' test is employed.") and Munson v. State, 211 Ga. App. SO, 83 (1993) ("A deferential standard of review is appropriate to further the Fourth .Amendment's strong preference for searches conducted pursuant to a warrant...."). The Court finds that the Barrow County search warrant set out mere suspicious circumstances; however, mere suspicion is not sufficient to establish probable cause. See State v. Alonso, 159 Ga. App. 242 (1981) ("A warrant must stand on firmer grounds that mere suspicion.)"' and State v. Porter, 167 Ga. App. 293 (1983) (affirming the grant of the defendant's motion to suppress where the officers' observations regarding drug traffic activity raised at most, a mere suspicion that drugs were being kept on the defendant's premises).

As to the 130 Chateau Terrace search warrant, the Court finds that the case of Boatright v. State, 225 Ga. App. 181 (1997) provides guidance. In Boatright, the defendant was illegally searched during a traffic stop and marijuana was found. As a result of the marijuana yielding traffic stop, the defendant's probation officer issued a probation arrest warrant. Upon arrest, the defendant consented to a search of his home and contraband was found. Before trial, the defendant moved to suppress the evidence that was found at his home. The trial court denied the motion. In reversing the trial court, the Georgia Court of Appeals held that the probation warrant was invalid because it resulted directly from the illegal traffic slop search. The court went on ro hold that no evidence obtained as a result of the invalid warrant could be introduced against the defendant at trial.

Similar to the facts of Boatright as a result of an illegal search, an arrest warrant was issued. Applying the holding of Boatright, because the initial search mas illegal.

the resulting arrest and search warrants were invalid. Therefore. the evidence obtained as a result of the invalid arrest warrants and subsequent search warrant cannot be introduced at trial.

At the suppression hearing, the State argued that Athens- Clarke County Magistrate Charles Auslander's determination of probable cause based upon the affidavit presented to him regarding the 130 Chateau Terrance address validates the search. In light of the case of Wong Sun v. United States, 371 U.S. 471 (1963) and the resulting line of case law, the Court finds that the State's argument must fail because the primary taint of illegality was not purged. See Wong Sun v. United States, 371 U.S. 471,487-88 (1963) ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality. the evidence to which objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'") and Donner v. State, 191 Ga. App. 58.63 (1989) ('As originated in Wong Sun v United States. ..the inquiry is whether the appearance of probable cause was obtained by 'exploitation' of the illegality. While the term 'exploitation' is not defined in Wong Sun, a number of relevant factors have gained general acceptance. Those factors.. .are.. . temporal proximity, intervening circumstances, and the purpose and flagrancy of the official misconduct.").

A review of evidence presented at the suppression hearing shows that the issuance of the 130 Chateau Terrace search warrant is a direct result of the primary taint – the illegal Search of 911 Justin Drive. In essence, but for the contraband illegally found at 911 Justin Drive, the officers

would not have had reason to obtain arrest warrants and gain access to 130 Chateau Terrace. The Court finds that the State failed to present testimony showing that the evidence obtained at 130 Chateau Terrace came about by means sufficiently distinguishable to be purged of the primary taint. See O.C.G.A. § 17-5-30(b) (..."the burden of proving that the search and seizure were lawful shall be on the state.. ..").

Accordingly, the Defendant's Motion to Suppress is hereby GRANTED.

Let a copy of this Order be sent to Mr. Scott Davis, Attorney for the Defendant, and Mr. Brian Patterson, Assistant District Attorney.

So Ordered, this 20th day of November, 2003.

/s/ Steve C. Jones
Steve C. Jones, Judge
Superior Courts
Western Judicial Circuit

IN THE SUPERIOR COURT OF ATHENS-CLARKE COUNTY

STATE OF GEORGIA

[stamped filed September 8, 2003, 2:54 p.m.]

STATE OF GEORGIA Plaintiff, v. $10,723.00 IN UNITED STATES CURRENCY, et. al. Defendant.	)))))))))))	CIVIL ACTION NO.: SU-03-CV-0899-SW

Motion to Suppress Evidence Illegally Seized and Motion for Return of Property

COMES NOW, DeMond Stovall, in the above-styled case and moves this Honorable Court to suppress evidence illegally seized and to return property pursuant to O.C.G.A. §17-5-30. For grounds therefore Claimant shows as follows:

1.

On or about March 31st, 2003, officers with the Barrow County Sheriff's Office to include Sergeant Pace along with officers of the Athens-Clarke County Police Department to include Officer Hunsinger conducted an illegal search at 130 Chateau Terrace, Apt. 20, Athens-Clarke County, Georgia. At said time and place without a valid search warrant and/or arrest warrant, the residence was searched and $10,723.00 was seized without

probable cause, without reasonable articulable suspicion and without exigent circumstances.

2.

At said time and place, neither Claimant nor any resident or other person present at 130 Chateau Terrace, Apt. 20, Athens-Clarke County, Georgia had not violated any laws nor did Officer Pace or any other person have reason to believe that, neither Claimant nor any resident or other person present was engaged in any criminal activity.

3.

Claimant, any resident nor any other person present at the residence had committed no violations of the law in the presence of the officers.

4.

Any warrant that was issued was issued without probable cause and based upon information obtained from an unreliable informant who was paid to provide information to the Barrow County Sheriff's Department and to the Athens-Clarke County Police Department, who is working off charges from the Barrow County Sheriff's Department and the Athens-Clarke County Police Department or other law enforcement agencies, and had a personal vendetta against the resident of 130 Chateau Terrace, Apt. 20, Athens-Clarke County, Georgia.

5.

Said search warrant was improper on its face and in that it failed to properly designate the place to be searched, the items to be seized, and the scope of the search.

6.

Said search warrant was over broad and a general search warrant.

7.

The affidavit filed in support of any alleged search warrant was utterly lacking in indicia of probable cause in that it failed to establish the reliability and basis of

knowledge of the informant who gave the information upon which it was based. Further, said affidavit was based on unreliable information that was not corroborated by any independent investigation on the part of law enforcement and was merely a rumor circulating in the underworld. The informant gave information as a personal vendetta against the resident of 130 Chateau Terrace, Apt. 20, Athens-Clarke County, Georgia.

8.

Any entry into and search of 130 Chateau Terrace, Apt 20 was illegal as it was fruit of the poisonous tree. Said entry and search were based upon evidence allegedly gathered from an illegal search at 911 Justin Drive, Statham, Barrow County, Georgia on or about 30 March 03. The same officers that had conducted the illegal search and seizure based on an invalid warrant at 911 Justin Drive, Statham, Georgia, Barrow County initiated entry and search of 130 Chateau Terrace, Apt 20, Athens on or about 31 March 03. The affidavit which was utilized to obtain the warrant at 911 Justin Drive was utterly lacking in indicia of probable cause in that it failed to establish any information which would support probable cause that contraband would be located at the property.

Furthermore, any information obtained was based unreliable information which was not corroborated by any independent investigation on part of law enforcement would merely be a rumor circulating in the underworld. The informant who gave information gave it as a personal vendetta against the defendant. Thus, this tainted search warrant resulted in the illegal seizure of alleged contraband at 911 Justin Drive, Statham, Georgia, Barrow County. Officers from Barrow County then obtained an arrest warrant based on this illegal search and seizure at 911 Justin Drive. Officers of the Barrow County Sheriff's Department went to 130 Chateau Terrace, Apt. 20, in Clarke County to serve this

illegal arrest warrant. When they approached the apartment they thought it was unoccupied. Therefore, they entered the apartment. Not only did they enter the apartment but they conducted an illegal search after entering breaking into closets and locked cabinets, well outside the scope of any arrest warrant. After finding what they believed to be contraband, the Officers of Barrow County then led Athens-Clarke County Officers to the sight and then the Clarke County Officers then proceeded to obtain a search warrant for 130 Chateau Terrace, Apt. 20, Athens-Clarke County, Georgia. Clearly, this warrant was also tainted as fruit of the poisonous tree and derived merely from the illegal search 911 Justin Drive, Statham, Georgia.

9.

The unlawful seizure and search was not pursuant to consent on part of the Claimant or any person at 130 Chateau Terrace, Apt 20, was a forcible arrest and seizure without warrant, and without exigent circumstances. Furthermore, the entry, search, and seizure was not pursuant to any probable cause obtained prior to the seizure of the property. Any consent obtained was obtained after the illegal seizure, and was not voluntary, and was obtained as the result of an illegal arrest, search and seizure.

10.

The search was executed in an unlawful manner and was unreasonable in it's scope and intensity and amounting to a general search. The search was executed in a manner that went beyond the scope of any alleged consent given. The illegal entry and search of 130 Chateau Terrace, Apt. 20, was not based on any good faith belief on the part of the officers executing the search that probable cause did in fact existed or that exigent circumstances existed such that officers were unable to obtain a warrant from a neutral and detached magistrate.

11.

Any alleged search warrant used to search the property of 130 Chateau Terrace, Apt. 20, was utterly lacking in indicia of probable cause and was unsupported by probable cause.

12.

Such other grounds may arise at an evidentiary hearing on this matter.

13.

As a result of said illegal search and seizure, quantity of alleged marijuana and other contraband was allegedly seized from the property of 130 Chateau Terrace, Apt. 20, Athens-Clarke County, Georgia.

14.

As a result of said search and seizure $10,723.00 in Lawful United States Currency was seized from the apartment and this property was being held by DeMond Stovall, bailee for the claimant, holding the property for owner Judy Richardson.

15.

This illegal entry, arrest, search and seizure violated Claimant's rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, and under Article I, Section I, Paragraph of the Georgia Constitution, and O.C.G.A. §17-5-30.

WHEREFORE, Claimant prays that this court inquire into this matter further and enter an order suppressing any and all evidence obtained as a result of the illegal entry, arrest, search and seizure, including any intangible evidence, statements, or otherwise seized in violation of Claimant's rights of the Constitution of the United States, Constitution of the State of Georgia, and O.C.G.A. §17-4-20. Claimant further prays that this court enter an order returning all property, not contraband, seized as a result of said illegal search and seizure.

This 8th day of September, 2003

Respectfully submitted,
/s/ James W. Smith
James W. Smith, for the Firm
Attorney for Defendant
Georgia State Bar No.: 660625

CERTIFICATE OF SERVICE

This is to certify that I have this day served the State with a copy of the following documents:

x Motion to Suppress Evidence Illegally Seized and Motion for Return of Property

by:

X by mailing a copy to the prosecuting attorney at his/her published address via first-class mail with sufficient postage thereon to assure delivery, addressed as follows:

Anthony C. Lee Hing
Special Assistant District Attorney
3200 Highlands Parkway, Suite 420
Smyrna, Georgia 30082-5192

This 8th day of September, 2003.

Respectfully submitted,

/s/ James W. Smith
James W. Smith, for the Firm
Attorney for Defendant
Georgia State Bar No.: 660625

Law Offices of

JAMES W. SMITH & ASSOCIATES
260 College Avenue
Athens, GA 306010
(706) 353-3300

IN THE SUPERIOR COURT OF ATHENS-CLARKE COUNTY

STATE OF GEORGIA

[stamped filed September 8, 2003, 2:55 p.m.]

STATE OF GEORGIA Plaintiff, v. $10,723.00 IN UNITED STATES CURRENCY, et. al. Defendant.	)))))))))))	CIVIL ACTION NO.: SU-03-CV-0899-SW

ANSWER AND CLAIM TO COMPLAINT ON FORFEITURE

COMES NOW, DeMond Stovall, Claimant in the above-styled case, and files this his answer to the complaint for forfeiture and claimed to the property described in the style above and described in paragraph 1 of the complaint for forfeiture.

Claimant answers the complaint as follows:

FIRST DEFENSE

The complaint for forfeiture fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The complaint is barred by the Statue of Limitations as set forth by O.C.G.A. §16-13-49(x)(5).

THIRD DEFENSE

Plaintiff lacks probable cause for the institution of

this lawsuit.

FOURTH DEFENSE

The forfeiture of $10,723.00 in lawful United States Currency would violate the Excessive Fines Clause in the United States Constitution as set forth in Amendment XIII of the United States Constitution and the Excessive Fines Clause of the Georgia Constitution as set forth in Article I, Section I, Paragraph 7 of the Georgia Constitution.

FIFTH DEFENSE

The complaint for forfeiture is based in whole or in part on evidence seized in violation of Claimant's rights under the Fourth, Fifth, and Sixth Amendment rights under the Constitution of the United States. Further, the evidence was illegally seized illegally seized in violation of Claimant's rights under Article I, Section I, Paragraph XIII of the Georgia Constitution and O.C.G.A. §17-5-30.

SIXTH DEFENSE

The statue upon which the complaint for forfeiture is based, O.C.G.A. §16-13-49, is unconstitutionally vague and over broad.

SEVENTH DEFENSE

The statue upon which the complaint for forfeiture is based, O.C.G.A. §16-13-49, violates the Fourteenth Amendment of the United States Constitution in that it denies Claimant Equal Protection of the Law and violates Due Process by unconstitutionally shifting the burden of proof to the Claimant.

EIGHTH DEFENSE

The forfeiture would be an unconstitutional taking of property without due compensation as provided for in the Fifth and Fourteenth Amendments of the United States Constitution and like provisions of the Georgia Constitution.

NINTH DEFENSE

The complaint for forfeiture fails to set forth with sufficient specificity any violation giving rise to a forfeiture

of the property.

1.

The allegations contained in paragraph 1 of the plaintiff's complaint are affirmed.

2.

The Claimant is without sufficient knowledge or information to either affirm or deny the allegations contained in paragraph 2 of the plaintiff's complaint.

3.

The allegations contained in paragraph 3 of the plaintiff's complaint for forfeiture are denied to the extent that they aver that the seizure of any property from 130 Chateau Terrace, Apartment 20, Chateau Club Apartments, Athens-Clarke County, Georgia was lawful. Claimant does not deny that the property was seized by law enforcement officers of the Athens-Clarke County Police Department Drug and Vice Unit and other law enforcement officers. Claimant is without sufficient knowledge or information so as to affirm or deny the allegations contained in paragraph 3 regarding the seizure of any other property.

4.

Claimant denies the allegations contained in paragraph 4 of the plaintiff's complaint.

5.

Claimant denies allegations contained in paragraph 4 of the plaintiff's complaint.

6.

Claimant is the bailee and holding the funds for the owner, Judy Richardson, of the $10,723.00 in Lawful United States Currency. However, Claimant is without sufficient knowledge or information such as to form a reasonable belief as to the truth or falsity of the allegations as to any other Claimants.

CLAIM

COMES NOW, DeMond Stovall, Claimant in the

above-styled case and files this his claim to the property described as $10,723.00 in Lawful United States Currency seized from 130 Chateau Terrace, Apartment 20, Chateau Club Apartments, Athens-Clarke County, Georgia on or about March 31, 2003. In support of said claim, Claimant shows as follows:

1.

The caption of the proceedings is set forth above.

2.

The Claimant will accept mail at her attorney's address:
Law Offices of James W. Smith 260 College Avenue, Athens, Georgia 30601. Phone: (706) 353-3300.

3.

The nature and extent of Claimant's interest in the property are as follows: He is the bailee and holding the funds for the sole owner, Judy Richardson, of the $10,723.00 in Lawful United States Currency, seized from 130 Chateau Terrace, Apartment 20, Chateau Club Apartments, Athens-Clarke County, Georgia on or about March 31, 2003.

4.

The date, identity of the transfer, and circumstances of Claimant's acquisition in the interest of the property are as follows:

a. Claimant obtained the $10,723.00 in Lawful United States Currency from his mother, Judy Richardson, on or about April 9, 2002. Claimant was to hold this money and distribute to his younger brother Dominique Walker for living expenses while Dominique attended Georgia Southern Polytech in Marietta, Georgia. Claimant's mother, also a claimant, obtained the $10,723.00 during her employment at Saint Gobain Corporation with which she started working in September of 1977. Ms. Richardson possesses a 401K Plan with said corporation and had accumulated this money in her 401K Plan. On or about April 9th, 2002 Ms. Richardson

withdrew this $10,723.00 in Lawful United States Currency, along with another portion of money to be utilized by her son, Dominique Walker, to cover in living costs while this son attended Georgia Southern Polytech in Marietta, Georgia. The mother provided this money to her son, DeMond Stovall to hold and provide to her other son, Dominique Walker, as needed. (See attached loan distribution statement from Saint Gobain Corporation.) Thus, this $10,723.00 in Lawful United States Currency claim is a portion of the $15,618.00 withdrawn by Judy Richardson from her 401K Plan.

5.

The specific provision of this code section relied on asserting the property is not subject to forfeiture:
Claimant denies that the property is subject to forfeiture pursuant to O.C.G.A. §16-13-49(d):

1. Since the property is not a controlled substance or a controlled substance analog;
2. Is not property which is directly or indirectly used or intended for use in any manner to facilitate a violation of the Georgia Controlled Substances Act or any proceeds derived or realized therefrom;
3. Is not property located in the state which was directly or indirectly used or intended for use in any manner to facilitate a violation of the Georgia Controlled Substances Act or of the laws of the United States or any of these several states relating to controlled substances, which is punishable by imprisonment for more than one year, or any proceeds derived or realized there from;
4. Is not a weapon possessed, used, or available for use in any manner to facilitate a violation of the Georgia Controlled Substances Act, or any of the laws of the United States, or any of the laws of the several states relating to controlled substances which is punishable by imprisonment for more than one year;

5. Was not obtained from an enterprise that a person has established, operated, controlled, conducted, or participated in a violation of the Georgia Controlled Substances Act, or any of the laws of the United States or any of the laws of the several states relating to Controlled Substances, which is punishable by imprisonment for more than one year, or any proceeds derived, or realized therefrom; and

6. Is not monies, negotiable instruments, securities, or other things of value, which have been found in close proximity to any controlled substance or marijuana or cocaine, or any other property which is subject to forfeiture under this section.

6.

The Claimant asserts that the property is not subject to forfeiture based on the provisions of O.C.G.A. §16-13-49(e), because the Claimant is not: :

7. Not legally accountable for the conduct giving rise to it's forfeiture, did not consent to it, did not know, and could not have reasonably known of the conduct, or that it was likely to occur;

8. Had not acquired and did not stand to acquire substantial proceeds from conduct giving rise to it's forfeiture other than as an interest holder in an arm's length commercial transaction;

9. Was not a conveyance for transportation that was held jointly in common or in community with the person who's conduct gave rise to it's forfeiture;

10. Did not hold the property for the benefit or as a nominee for any person who's conduct gave rise to it's forfeiture, and the money was acquired as a bona fide purchaser for value without knowingly partaking in any illegal transaction;

11. The interest was acquired before the completion of the conduct giving rise to it's forfeiture, and the person who's conduct gave rise to the forfeiture did not have authority to

convey the interest to a bona fide purchaser for value at the time of the conduct; and

12. The violation involved in this case was 1 gram or less of a mixture containing cocaine or four ounces or less of marijuana, and was not used to facilitate a transaction in or purchase of, or sale of a controlled substance of marijuana or cocaine.

7.

Claimant asserts that the property was seized in violation of Claimant's rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, and like provisions of the Georgia Constitution and O.C.G.A. §17-5-30.

8.

The essential facts supporting these assertions are as follows:

A. On or about March 31, 2003, Officers with the Barrow County Sheriff's Office without a valid warrant, without probable cause, and without exigent circumstances illegally entered and searched 130 Chateau Terrace Apartments, Apt. No. 20, Athens-Clarke County, Georgia and illegally seized said $10,723.00 in Lawful United States Currency. At the time no one located at that address had committed any violations in the presence of any officers and the search and seizure of said currency was without reasonable articulable suspicion of criminal activity and was without any probable cause of any criminal violation.

B. At the time of the search no contraband was found near the $10,723.00 in Lawful United States Currency.

C. An alleged resident of the apartment, Mr. DeMond Stovall was arrested without probable cause and without a valid warrant.

D. The property was not used to facilitate a violation of the Georgia Controlled Substances Act, was not found in close proximity to any controlled substances, and was the lawful property of the Claimant, Judy Richardson. The currency

was not acquired from the illegal activity. Furthermore, there is no evidence that the claimed currency was used to facilitate any transfer, sale, or any other violation of the Georgia Controlled Substances Act.

E. Any alleged entry into the apartment by the Barrow County Sheriff's Department was void based on alleged arrest warrant issued out of Barrow County. Barrow County using this improper and void arrest warrant entered the above-described premises and began an illegal search of the property to include entering locked and closed areas. The $10,723.00 in Lawful United States Currency was located in a locked safe. The search by these officers was well outside the scope of a valid arrest warrant and the entry into this locked box was illegal and improper.

D. The illegal actions on part of the Barrow County Officers resulted in them calling the Athens-Clarke County Drug and Vice Squad to include Sergeant Hunsinger.

E. This arrest warrant and the search and seizure by the Barrow County Sheriff's Office and the Athens-Clarke County Drug and Vice Squad are fruit of the poisonous tree and any resulting evidence seized was in fact, improperly seized. The basis for this contention is that on or about March 30, 2003 the residence at 911 Justin Drive in Statham, Georgia, Barrow County was searched pursuant to an illegal and invalid warrant. The search of that property at 911 Justin Drive, Statham, Georgia, Barrow County, led to the issuance of the arrest warrant for DeMond Stovall. This arrest warrant was then utilized by the Barrow County Sheriff's Office to illegally enter the property at 130 Chateau Terrace, Apt. 20, Athens-Clarke County, Georgia. Subsequently, this illegal entry and search was the basis of a warrant being issued to the Drug and Vice Squad in Athens-Clarke County. That warrant is also fruit of the poisonous tree.

F. This search warrant that was issued for 911 Justin Drive

was the only basis for the search of that property as there were no exigent circumstances justifying a search nor was there any exception to the search warrant requirement.

G. The search warrant issued from 911 Justin Drive which precipitated the arrest warrant and subsequent search warrant at 130 Chateau Terrace , Apt. 20, was illegal and void and any evidence seized as a result thereof must be suppressed because

1. The scope of the warrant was impermissibly broad and lacking in probable cause for each of the items sought to be searched for and seized;

2. The description of the place and person to be searched lacks sufficient description and the description of the items to be searched for and seized was impermissibly vague;

3. The warrant was based in part on information provided by an unnamed informer who has not shown to be reliable. The magistrate was not informed of the informer's relationship to the case in which the informer was offered favors by law enforcement, given promises of leniency by law enforcement and allowed to assist law enforcement officers in return for assistance in the informer's own case. The magistrate was not informed of said informer's bias or the informer's criminal history.

4. The said warrant was stale.

5. Said warrant was not timely executed.

6. Said warrant did not contain sufficient information to establish probable cause. Said affidavit for search warrant contained mere speculation and conjecture and does not rise to the level to constitute sufficient probable cause for the warrant to be issued.

H. Accordingly, anything derived from this illegal search warrant for 911 Justin Drive including the arrest warrant for DeMond Stovall and the subsequent illegal search and seizure at 130 Chateau Terrace, Apt. 20 and the subsequent search warrant must be suppressed as it was in violation of

the Fourth, Fifth; and Fourteenth Amendments to the United States Constitution and under Article I, Section I, Paragraph XIII of the Constitution of the State of Georgia.

9.

Claimant seeks the return of $10,723.00 in Lawful United States Currency.

WHEREFORE, Claimant prays:

1) That the complaint for forfeiture be dismissed;

2) That the relief sought by the Plaintiff be denied;

3) That a hearing be held on the merits of all claims and defenses.

4) That the property be returned to her possession instanter.

This 8th day of September, 2003

Respectfully submitted,
/s/ James W. Smith
James W. Smith, for the Firm
Attorney for Defendant
Georgia State Bar No.: 660625

CERTIFICATE OF SERVICE

This is to certify that I have this day served the State with a copy of the following documents:

x Answer and Claim to Complaint for Forfeiture

by:

X by mailing a copy to the prosecuting attorney at his/her published address via first-class mail with sufficient postage thereon to assure delivery, addressed as follows:

Anthony C. Lee Hing
Special Assistant District Attorney
3200 Highlands Parkway, Suite 420
Smyrna, Georgia 30082-5192

This 8th day of September, 2003.

Respectfully submitted,

/s/ James W. Smith
James W. Smith, for the Firm
Attorney for Defendant
Georgia State Bar No.: 660625

Law Offices of
JAMES W. SMITH & ASSOCIATES
260 College Avenue
Athens, GA 306010
(706) 353-3300

VERIFICATION

COMES NOW, DeMond Stovall, affiant named herein, before the undersigned officer authorized to administer oaths, after being duly sworn, deposes and states that the facts contained in the within and foregoing Answer and Claim to Forfeiture are true to the best of affiant's information, knowledge, and belief under penalty of perjury.

This 8TH day of September, 2003.

/s/ Demond Stovall
Affiant

Sworn to and subscribed before me,

this 8th day of September, 2003.

/s/ Amy H. Milner
Notary Public
[SEAL: AMY H. MILNER, NOTARY PUBLIC, ATHENS-CLARKE COUNTY, GA., EXP. SEPT. 12, 2005]

N THE SUPERIOR COURT OF ATHENS-CLARKE COUNTY

STATE OF GEORGIA

[stamped filed October 6 8, 2003, 4:55 p.m.]

STATE OF GEORGIA Plaintiff,	)	CIVIL ACTION NO.: SU-03-CV-0899-SW
v.	)	
$10,723.00 IN UNITED STATES CURRENCY, et. al.	)	
Defendant.	)	

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE ILLEGALLY SEIZED

Comes Now Demond Stovall, claimant in the above-styled case, and files this Brief in Support of Motion to Suppress Evidence Illegally Seized, and for the grounds set forth herein respectfully requests that it be GRANTED.

BRIEF STATEMENT OF FACTS

On 30 March 2003, law enforcement officers with the Barrow County Sheriff's Office to include Detective Ben Ewing conducted a search at 911 Justin Drive in Statham, Georgia. He ostensibly obtained a warrant on the same date from Sonya Davis, a part-time magistrate of Barrow County. Although this alleged warrant is nowhere to be found and was never proven to exist, there was an affidavit for search warrant made by Ewing to Davis for 911 Justin Drive.

Portions of the information in the warrant were gained during an illegal stop and detention of Stovall shortly prior to this date.

Ewing and other officers made entry into 911 Justin Drive and located alleged contraband to include marijuana. Ewing determined that 911 Justin Drive was a residence belonging to Stovall and made application for and was issued arrest warrants for Demond Stovall on 31 March 2003.

Ewing then proceeded to 130 Chateau Terrace, apartment 20 in Athens along with Athens-Clarke County officers to include Chris Fogel. This residence was found to also belong to Stovall as was testified to by his mother and by Fogel. The officers retrieved a key from the apartment personnel and entered the apartment. After entering apartment 20, they proceeded to search the residence and located alleged marijuana. The officers' search included breaking open a locked closet that was secured with a lock on the outside. A safe and a bag were located therein.

These officers then again ostensibly obtained a warrant dated 21 March 2003 with an application for search warrant dated 31 march 2003 utilizing the evidence located from the earlier entry into the apartment. A quantity of marijuana was then located in the bag from the closet along with cash.

ARGUMENT AND CITATION OF AUTHORITY

1. THE SEARCH AT 130 CHATEAU TERRACE APT. 20 AND THE SEIZURE OF ALLEGED MARIJUANA THEREFROM WAS FRUIT OF THE POISONOUS TREE.

Georgia's exclusionary rule is codified at OCGA 17-5-30, and it provides for the suppression of evidence

obtained by an unlawful search and seizure conducted either with or without a warrant. Boatright v. State, 225 Ga. App. 181 (1997). There is no good-faith exception to this exclusionary rule in Georgia. Id. citing Gary v. State, 262 Ga. 573, 574 (1992). Gary involved a warrant issued by a Jackson County magistrate authorizing the search of a house that was not supported by probable cause.

"The introduction of evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause" has no application in Georgia jurisprudence due to the legislative mandate of OCGA 17-5-30. Boatright at 183 citing Gary.

In Boatright, a case directly on point to the issue in the case at bar, the defendant was stopped and illegally frisked by law enforcement officers. This illegal frisk resulted in the seizure of marijuana from the defendant. Learning of the marijuana traffic stop, defendant's probation officer issued a probation warrant for his arrest. Upon his arrest of defendant at his home on this probation warrant nine days after the illegal frisk, defendant consented to the search of his home and marijuana was discovered therein. The Boatright court ruled that the probation warrant reasonably relied upon by the arresting officers was invalid because it resulted directly from an illegal search. Id. at 183 referring to Jones v. State, 126 Ga. App. 841 (1972) (fruit of illegal search cannot be used as basis of arrest). Applying the rule of Gary, supra, the court held that no evidence obtained as a result of the illegal warrant could be introduced against Boatright at trial. Id. at 183.

The Boatright court went on to distinguish its case and Gary from Harvey v. State, 266 Ga. 671 (1996) wherein a defendant was arrested on a bench warrant that had been recalled, yet the arrest was valid. Boatright, like Gary, involved a search of the home, not a search of a person in a

public place as in Harvey. Moreover, in Boatright it was the affirmative acts of the police themselves which invalidated the warrants, unlike an administrative computer glitch in Harvey. Id. at 184. The affiant for the warrant in Gary did not present sufficient facts to establish probable cause, and the officer who searched Boatright in the traffic stop did so illegally. Id. at 184.

In the case at bar, the Barrow County officers including Ewing did not present sufficient facts to establish probable cause for the issuance of any search warrant at 911 Justin Drive, Statham. Therefore, the marijuana seized from that location was illegally seized and the warrants issued from the discovery of contraband at 911 Justin Drive were illegal. Furthermore, these illegal warrants caused law enforcement to enter 130 Chateau Terrace, apartment 20, said entry resulting in the discovery of marijuana that led to the issuance of the Clarke County warrant. This discovery and seizure of contraband at 130 Chateau Terrace, apartment 20 was fruit of the poisonous tree.

Another case on point comes out of Barrow County. In State v. Dukes, 243 Ga. App. 343 (1998), the court upheld the trial court's ruling that the seizure of 59 rocks of crack cocaine made during the arrest of defendant upon the execution of an invalid parole warrant was fruit of the poisonous tree and therefore should be suppressed. A warrant which was invalid because it was based on an unlawful search cannot serve as probable cause to arrest. Id. citing Boatright. Unlike the valid warrant which was issued in Harvey, but later recalled, the warrant in this case was invalid from the day it was issued. Id. at 151.

In the forfeiture case at hand, the search was unlawful as the application for warrant was devoid of probable cause. So, the arrest warrants were invalid and could not provide probable cause to arrest Stovall. Clearly, the subsequent entry into his apartment based upon those arrest warrants and

the discovery of alleged contraband used to form the basis of probable cause for the warrant issued after said entry into his home was illegal. Everything located at 130 Chateau Terrace, apartment 20 was fruit of the poisonous tree.

2. BURDEN OF SHOWING THE LAWFULNESS OF THE SEARCHES IS ON THE STATE AND THE STATE FAILED TO MEET THE BURDEN.

In a hearing on a motion to suppress evidence illegally seized, the judge shall receive evidence on any issue of fact necessary to determine the motion; "and the burden of proving that the search and seizure were lawful shall be on the state". OCGA 17-5-30(b). The Boatright court found that although it was incumbent upon the State to prove the legality of the searches, it failed to carry its burden.

In this case, the state failed to introduce any evidence of the occurrences in Barrow County. It repeatedly refused to go forward with its burden. They failed to present any warrants for the searches in Barrow County or to prove the legality of the searches.

3. THE APPLICATION FOR SEARCH WARRANT IN BARROW COUNTY WAS DEVOID OF PROBABLE CAUSE.

The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating law enforcement officers gain as a result of an illegal arrest taking place in the home should be excluded to deter such conduct. Boatright, supra, citing Carranza v. State, 266 Ga. 263, 268 (1996).

In determining the sufficiency of an affidavit to support the issuance of a search warrant, Georgia courts employ the totality of the circumstances analysis enunciated

in Illinois v. Gates (citation omitted) and adopted by the Georgia Supreme Court in State v. Stephens (citations omitted) with the admonition that prudence counsels that Gates be considered the outer limit of probable cause. Christopher v. State, 245 Ga. App. 862 (2000)(emphasis added).

The court in Christopher went on to affirm the trial courts finding that the issuing magistrate had a substantial basis for concluding that probable cause existed. The search warrant issued for the search of the defendants home was based on an affidavit concerning a suspected marijuana grow operation. The affidavit contained the following information: (1) the affiant had been with the GBI for 12 years and conducted numerous marijuana investigations; (2) defendant was seen leaving Atlantis Hydroponics in Athens with a lighting device commonly known by law enforcement personnel to be used to cultivate marijuana; (3) defendant home had 2 electric meters connected to the residence, and the house appeared to be heated by propane gas; (4) the power bills for one account at the residence showed an increase in power bills outage by 354 percent; (5) the other account showed the power bill doubled; (6) an exaggerated power bill is consistent with the enterprise of growing marijuana with indoor lights; (7) equipment known to be commonly used to grow marijuana indoors to include PVC piping, water hoses running to the basement, a rusty air tank with copper tubing going into the basement window, and a crude ventilation system out of the basement window was observed at the defendant residence; (8) a FLIR was used to show unusual heat emitting from the home; (9) defendant had a landscape business unfamiliar to the Department of Agricultural Plant Protection Division; (10) the vehicles of 2 persons with a criminal history of marijuana use and distribution were at defendants home on several occasions; and (11) a Ryder truck was at the residence. McClure further

found from the local manager of the garden center that (1) it was not economical advantageous for a small operation to use hydroponics equipment; (2) there is no commercial use for hydroponics in a landscaping business; (3) carbon dioxide is a stimulant for plant growth but not economical for commercial production; (4) the manager had never seen carbon dioxide used for a small plant production company; and (5) during his 12 years in law enforcement, affiant had only seen hydroponics equipment and carbon dioxide used for the indoor production of marijuana. Id. at 864.

The affidavit in the case at hand is a far cry from that in Christopher. As Gates is the outer limits of probable cause, the warrant in the case at hand fails to even attain the reasonable articulable suspicion standard. Georgia jurisprudence is clear that a home is afforded considerably more protection from searches than do vehicles. The discussion in Harvey, Gary and Boatright, supra, amplify this.

The elements included in the affidavit of this case have been found insufficient to support the search of a vehicle by the appellate courts of this state. Surely, they fail to establish probable cause to search a home.

The fact that Stovall was allegedly seen by Fogel leaving the hydroponics shop, but without any items as in Christopher is significant. Even if he had been seen with equipment, it is clear from Christopher that would not be enough. More importantly, because Fogel had obtained a search warrant for 130 ChateauTerrace on 17 February 2003 based on seeing Stovall leave Atlantis Hydroponics, it is fair to say that Fogel was on a fishing expedition. Unable to gain any FLIR readings from the Athens apartment, Fogel then told Barrow County to watch out for Stovall.

Barrow County then saw Stovall 911 Justin Drive in his mother's car. He was seen leaving the house with a white plastic bag that he placed in the trunk. The officer had no

way to determine what it may have contained. In State v. Nichols, 196 Ga. App. 709 (1990), law enforcement listened in to a telephone conversation where a suspect, who had sold drugs to an agent on 2 occasions, was speaking with another male allegedly setting up a buy. Officers were looking for the suspect's supplier. Defendant and suspect arrived at the location officers heard described on the telephone intercept and observed defendant hand suspect a white paper bag. Shortly thereafter, suspect handed suspect what appeared to be money. The court affirmed the granting of the motion to suppress based upon absence of probable cause. Also, in State v. Wells, 153 Ga. App. 308 (1980) the court found there was insufficient information to search defendant's car based upon the statement of an informant that defendant tried to sell informant marijuana where he did not see the marijuana.

Stovall was then stopped by law enforcement reportedly for weaving. Even if this were the true reason for the stop, the detention of Stovall and questioning about the house was well beyond the investigation of the reason for the stop, thus is itself illegal and suppressible. In Gonzales v. State, 255 Ga. App. 149 (2002) the defendants were stopped for an obscured tag. Yet, the officer's questioning of the defendants concerning possession of contraband and searching their vehicle after the conclusion of the investigation related to the reason for the stop exceeded the permissible scope of the investigation and constituted an illegal detention. The drugs found were suppressed.

Likewise in State v. Gibbons, 248 Ga. App. 859 (2001), the trooper's detention of defendants while asking them questions after stopping them for a seatbelt violation was unauthorized, where the questions were not related to the violation, the trooper held license while he asked unrelated questions, and defendants were not free to go. Again the same issue arose in State v. Cooper, 260 Ga. App.

333 (2003), where in the court ruled that a new investigation for contraband was not supported by reasonable articulable suspicion just because defendant appeared nervous after being stopped for tag light out and weaving.

Stovall was clearly detained illegally. He refused to consent to a search of the car, yet the officer detained him while attempting to get a drug dog on the scene. Anything Stovall may have said or done is inadmissible. Regardless, his lawful right to refuse a search is no grounds to be used to support a warrant.

Also, even assuming arguendo that the stop was legal, no support from a warrant was derived therefrom. In State v. Thompson, 256 Ga. App. 188 (2002), defendant's nervousness and the smell of dryer sheets, alleged to mask the smell of marijuana, did not provide reasonable articulable suspicion to continue the investigatory stop. If that is not enough for a second tier detention, then what is in the warrant must fail to provide probable cause for the search of the home.

An important element missing in the investigation was any corroboration. Ewing testified that 911 Justin Drive belonged to Stovall. He verified this only based upon the search af the residence. Never prior to obtaining the warrant did he go to the utilities or tax office to ascertain who lived there. Even the neighbors did not know who lived there according to the affidavit. Facts as simple as who lives at or owns the house should have been corroborated among other things. See, e.g. Shivers V. State. 258 Ga App. 253 (2002).

4. **ENTRY INTO 130 CHATEAU TERRACE APARTMENT 20 WAS ILLEGAL BECAUSE OFFICERS HAD NO REASON TO BELIEVE DEFENDANT WAS PRESENT WHEN THEY ENTERED.**

Again, assuming arguendo that the arrest warrants

were valid, the police did not have probable cause to believe that Stovall was in the apartment. "Possessing an arrest warrant and probable cause to believe (defendant) was in his home, the officers were entitled to search anywhere in the apartment in which (defendant) might be found. (Until) he was found, … the search for him was (not) over, and there was (still) that particular justification for entering any place that had not yet been searched." State v. Wright, 204 Ga. App. 382, 383 (1992) citing Maryland v. Buie, 494 U.S. 325, 332-333 (1990)(emphasis added.) Wright is an interesting case where a Federal warrant was valid for the arrest while a Dekalb County warrant was invalid. Because the Federal warrant was valid, it provided an independent source for the arrest. Importantly, the court ruled it was proper for an agent to move a duffel bag in the attic to look for defendant.

Distinguishing our case, there was no information that law enforcement possessed to provide probable cause that defendant was in the apartment at the time they entered. Thus, entry was illegal. Also, the fact that the closet door was deadbolt locked from the outside defeats a claim that law enforcement believed Stovall was hiding on the inside. Thus, entry into the closet was also illegal and the fruits thereof inadmissible.

CONCLUSION

The illegal search in Statham based upon an illegally issued warrant which invalidated the subsequent warrants and searches of Stovall residence. Furthermore, the entry into the Athens apartment was improper as was the entry into he locked closet because there was no probable cause to believe defendant was there. Defendant respectfully requests that his Motion to Suppress be GRANTED.

This 6th day of October, 2003.

Respectfully Submitted,
/s/ Scott N. Davis

Scott N. Davis
Attorney for Defendant
Georgia State Bar No. 212710

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IN THE SUPERIOR COURT OF ATHENS-CLARKE COUNTY

STATE OF GEORGIA

[stamped filed September 1, 2004, 4:43 p.m.]

STATE OF GEORGIA Plaintiff, v. $10,723.00 IN UNITED STATES CURRENCY, et. al. Defendant.	)))))))))))	CIVIL ACTION NO.: SU-03-CV-0899-SW

CONDEMNATION HEARING

This is the transcript of the above-captioned proceedings, held before the Hon. David R. Sweat, Judge of the Superior Court of Clarke County, in the Athens-Clarke County Courthouse, Athens, Georgia, on September 26, 2003, at approximately 3:10 p.m.

APPEARANCES:

For the State: Mr. Lee Hing
Special Assistant District Attorney
Prosecuting Attorneys Council
Atlanta Georgia 30303 -2743

For the Defendant: Mr. Scott Davis
Attorney at Law
Athens, Geogria

James J. Meyer
Official Court Reporter
Western Judicial Circuit
Athens, Georgia
(706) 613-3172

[Starting at Page 164 of the Transcript]

MR. YING: No, Your Honor. They gave evidence and exhibits. The State at this stage waives opening and reserve our closing remarks.

THE COURT: All right, Mr. Davis.

MR. DAVIS: All right, Your Honor. First of all, Your Honor, I'll address the merits of our claim and then I'll address the merits of the illegal search and seizure. I believe that the claimant's show by a preponderance of the evidence that she and from statement elicited from the State, that she obtained 15,000 plus dollars from her 401K from a business that she'd been working at for 26 years, and that she'd been contributing to since 1978. She stated she gave these to Dernond for supporting her son, Dominique, and that she had a reason that she didn't want to keep that kind of cash on hand. I don't believe there's any showing that that money, other than speculation, was related to marijuana. In particular, the evidence shows that there were - - the question was asked to Ms. Richardson on the first day by the State was that there were three other people residing in the house at that time. There's no connection of that marijuana to Mr. Stovall. In particular, no fingerprints came out positive.

THE COURT: There's really no connection of Ms. Richardson to that money either.

MR. DAVIS: Well, I believe that the fact that she testified that she gave him that amount and that he kept it in a safe would be the sufficient --

THE COURT: Okay.

MR. DAVIS: -- connection in this case, Your Honor.

THE COURT: Okay. Go ahead then.

MR. DAVIS: Especially considering that looking at cash it's hard to identify as being, yeah, these are the bills or whatever I gave him so I believe that she met that burden. No, like I said, evidence, that the money was connected to the drugs, the fact that it was apparently found in the same closet but the safe itself was locked. That's interesting that the marijuana was not locked in there although we did hear some testimony about some marijuana found in the safe. We know the law states that -- That's amazing. There's no reports or anything but it was found in the safe, but nevertheless, Your Honor, even if we go with that premise it was less than four ounces which is less than the amount to subject this money to forfeiture. And certainly the other trying to attach them and saying it's all related I don't believe that has been or can be done.
The more troubling aspect of this case is that it was illegally seized. Our first argument is that the -- starting front and working backwards the officers came into this house with what they allege to be an arrest warrant and they opened up a closet to look in the closet. The telling testimony was by Mr. Fitzgerald where he said we wanted to see if Mr. Stovall or anybody was in there. Now, this is a closet they said that was locked from the outside that had to be jimmied up open with a knife. Somebody locked themselves in there with the inability to get out. It makes no sense whatsoever. Moreover, we look at State v. Schwartz which is a case, Your Honor, that was just handed me by Mr. Clark. It's at 261 Georgia App 742. It involves an execution of an arrest warrant and the Court ruled in this case that the

officers, even though they had an arrest warrant, did not have justification to even look in the window. Now, the State claimed that there were safety concerns that supported visual intrusion but --
THE COURT: Is this the one where they're sitting in the room and they look in the window? It's man and a woman and --

MR. DAVIS: You know the case. Yes, sir.

THE COURT: That's really -- It's a plain view case, isn't it?

MR. DAVIS: Well, no because it boiled down to the State said well, maybe we don't have plain view but we have the arrest warrants which allow us entry into the home. And the court said, well, no, there's not enough to allow you entry into viewing this. You have to have --

THE COURT: They can go to the front door and knock and inquire.

MR. DAVIS: Yes, does that then -- if you can't look in the window, can you jimmy open the closet? The Court said t h a t the witness never clearly described his conduct as a safety precaution. I don't think that t h a t ' s been done here and I don't think that that would be a valid search. Since you know the case, I don't really need to belabor this case, but I think --

THE COURT: I think I remember the case. I thought It was a plain-view case, but I see the analogy to the marijuana was on the coffee table or something of that nature; i s that right?

MR. DAVIS: Yes, sir . It was a plain-view case. They argued that they were allowed to be there.

THE COURT: I'm troubled by the search that was incident to the arrest warrant when no one was there. I think I'm going to get y ' all to brief the issue of whether or not you're going to be able to -- they went in with a key to an apartment that they -- although the evidence seems to show that Demond Stovall lived there, and it's not a third party. Clearly, if someone else lived there, they would have to have a search warrant to carry out a search for someone who is being sought under an arrest warrant and I think t h a t ' s U.S. v. Stieqel, but I as -- In 17-4-3, the code section about breaking open doors and order a rrest under a warrant charging crime the officer may break open the door of any house where the offender is concealed seems to be some basis, but it seems -- I just was not -- I didn't have the impression that you could go quite as f a r as they did in this case. That troubles me, so I just say that to you, Mr . Hing You may be able to address that concern but that has been troubling me because it is a -- t h e plain view is certainly a -- it can provide basis for the search warrant that was subsequently obtained, but if they - - they would have to have a right to have been in the master bedroom to see the marijuana cigarette which was found there and they -- I'm real -- the thing about opening the -- the jimmying the door in the closet seems -- I think I'm going t o have to be -- I'm going to need to hear some more about that.

MR. KING: Yes, I certainly will .

MR. DAVIS: And, Your Honor, the issue, the whole reason that I file d the motion in the method that I did,

you have the search warrant in front of you from Barrow County. Now, the entry into this apartment here was the fruit of the poisonous tree from that search warrant.

THE COURT: I can't -- I'm not convinced that the ~ search in Barrow County is illegal. I'm convinced that the State has failed to present the original search warrant, but --

MR. DAVIS: Oh, it's not just that. If you look at the four corners of the document, Your Honor, there's not probable cause in that. Sonja Davis is part-time magistrate, works at Burger King the rest of the time. If we look at the four corners, if we look at the case law, Your Honor, that search warrant has the following: Fogal says he saw Demond driving from the Atlantis Hydroponics. It doesn't say that he saw him bringing any growing lights, doesn't say he saw him bringing any growing equipment, just driving from that location. We know that based on that he tried to get a search warrant out here or didn't get one. Then he calls down to Barrow County, as you can see, and then he says, hey, watch out for Demond Stovall. The officer goes out to that residence where they believe he was and sees that blue car pull up. They don't even know who Demond Stovall is. Sees the blue car pull up, Your Honor, finds out that it's Judy Richardson's Cadillac and sees it twice. That's all he says. I see it twice on the property. Then one day he sees Demond come out and put a white plastic bag in the trunk. Nothing in there about what was in the plastic bag, what it looked like, just a white plastic bag. So what does the officer do? He stops him, an illegal stop. Gonzales is on point. Thompson is on point. If you read what he says In that stop, he's stopping him for weaving three times and

proceeds to question him about the house.
2002, Thompson, and I'll give you those cases, Your Honor, because I'm going to figure you need a little more time to actually look it over. Gonzales reversed the trial court because the stop is for the obscured tag, numerous questions were unrelated to the traffic stop. He was improperly detained after the investigation of the reason for the stop. Do we see anything in there about the reason for the stop? He held him there to question about the house. That's clear. So from that illegal stop and illegal detention the officer says well, Demond told me that he didn't live at that house, which in itself was illegal gained. The officer's response was then to go to the house and see the kid mowing the yard. He said, hey, you live here? The kid says, no, Demond lives here. Instead of making any attempt to verify who lives there the officer goes to neighbors who say, yeah, we see lights on at night and we don't know who lives there, and that's it.
That truly is the worse search warrant I've ever seen. I've only been doing this for ten years. There are probably worse ones but that's horrible. And, Your Honor, I have the cases that I'll give you because I'm not sure that you're going to be -- or even want to absorb it all, but the cases are clear.
There is the Christopher case which I think that's the one that comes from the Atlantis -- yeah, it is. It's a 2002 case. The Georgia Court of Appeals says, you know, this is Gates at its limits, but in this case the GBI saw somebody leaving Atlantis Hydroponics with lighting Instruments and lighting materials. Then this is a Jim Smith case too if I recall correctly. Then there were two electric meters that were outside and the power bill is 354 percent higher than the neighbors. What they attempted to say in the first warrant In

February and there were pipes and ventilation in the window. Of course, that is the outer limits of totality of the circumstances but we're not going to overturn the trial court. We don't have anything like that here. We have an individual with a plastic bag. There are numerous cases, Your Honor, that I can cite and will do so that show what is -- that doesn't tell you anything. Leaving a legal business, having a plastic bag in the car and lights being on, that's no basis for a search warrant. It just can't stand. I mean that's not a probable cause at all. I have some automobile style cases which -- Thompson, 256 Georgia App 188. It's a 2002 case. They said that in this case there's a stop of a vehicle. The driver appeared nervous and there were dryer, smell of dryer sheets and wash detergents and that was the - - the cop said, well you know we use that, they use that to mask the smell of marijuana. Of course, so what, it's legal. It's perfectly legal. And everything in here that he did is legal, Your Honor, and nothing is enough for probable cause, little alone reasonable articulable suspicion of a car as in Thompson. And we know the standard for the search warrant of a house is much higher than a warrant for a search of an automobile. I think there's a Patman case out of Judge Gaines' court where the court ruled that a smell of marijuana might support the search of an automobile but held that it may not be enough to support a search of a house. And I can provide these cases and brief you on them, Your Honor. I know I'm jumping all over, but I'm getting the feeling that it's kind of hard at this hour to grasp it all.

THE COURT: I'd like to take this under submission.

MR. DAVIS: Yes, sir.

THE COURT: So I understand the argument. Is it the -- There's not sufficient basis for the search at the Barrow County residence, which was resulted in the arrest warrants which then led to the search in Clarke County and the argument is that that's fruit of the poisonous tree and then the argument also is there is no basis for the extent of the search that was carried out at Apartment 20 of LeChateau or wherever that was at

MR. DAVIS: ,Yes, sir.

THE COURT: Okay. In addition to the fact that you have complained that the money is not guilty.

MR. DAVIS: That the money is not guilty?

THE COURT: That the money is not guilty.

MR. DAVIS: Did I say that?

THE COURT: No, you didn' t but I'm taking that from your argument.

MR. DAVIS: Okay.

THE COURT: Mr. Hing.

MR. HING: We are very basic, Your Honor. The first thing, the question to ask, does Judy Richardson have standing to contest the search. No. She does not live at either addresses. In fact, she said her son didn't live in Barrow County. And, Your Honor, is aware of the authorities, Sanders v. the State, 181 Georgia Appeals 117, Sheldon v. the State, 252 Georgia Appeals 444, and the burden is on her to show her standing, and she can

only show standing if she has a privacy interest i n the premises of that were searched. That i s the law. So in relation to Judy Richardson, there is no standing to controvert the legality of the search.

THE COURT: Well, Mr. Stovall has also filed a claim.

MR. HING: I am coming to him, Your Honor. In relation to her further, unless I am misreading i t , her theory that she gave him cash of 6,000 or 600, whichever the Court accepts, or the fact that she gave him $9,000 in checks and he's going to put it in cash in a safe? The only way this so-called ownership of the property can be, remain in her, it may be that she' s a bailor and he's a bailee. I am not saying it is not possible, but it is hardly likely and it beats all reasoning. Let us examine it in its totality . She cannot say that the money in the safe is the same money she gave her son. In fact, she gave him a check for 9,000. She cannot say because look at how the money is configured. It resembled drug proceeds, how the things are bought and sold because that is the clearest evidence that the money is involved with drugs, aside from its close proximity to drugs.
In the case the officer told you, yes, these are this and these are the prices, and the money corresponded. So whether as facilitating or in close proximity that money is contraband and nobody has any right to it. And in fact there's another thing that removes her standing even from contest in the forfeiture.
She has testified that she gave the money to her son thereby dispossessing herself of the property. The money was for a purpose of the other son. And when you pass on the money to the other son, what are we doing? We are in effect saying we have given possession to the other son

and there is no need for us to any longer hold it. And I'm going to just for the sake of -- One of the cases that really made a great difference in that context is a case that came out of the south. You see, once you relinquish control of money, then your standing is gone.

THE COURT: But she claims she gave him the money in trust for their son's education.

MR. HING: Yes, she gave him money but she didn't expect it back, so she becomes in effect -- she has vested herself of the money in favor of Dominique. And the thing is that she gave him 9,000 in check and 6,000 in cash.

In the case of Belvin v. the State of Georsia, reported 258 Georgia Appeals 790, it's a 2002 case. The man Belvin was arrested and charged with crimes including manufacturing marijuana. He telephoned his wife and told her he needed 10,000 cash to pay his attorney. Mary got the rent money from her tenant Hughes. She approached a sheriff's car, handed the money either to the sheriff, who made a deposit to the husband or directly to her husband. Oscar Belvin kept the money until the man arrived at the sheriff's office where he handed the money to the sheriff. The money was seized. Be bribed the sheriff with the money. The State filed an action for forfeiture against the money, naming Oscar Belvin as the purported owner. The complaint alleged that the property was directly or indirectly used or intended for use to facilitate a violation of the statute or was proceeds realized or derived therefrom.

Mary Belvin filed a response asserting that the money was her's, that it was derived from property rent and that she gave the sheriff the money so he could post a cash bond for her husband, and that the money was not

intended for use or derived from any violation of the law. The trial court found that Mary Belvin lacked standing to contest the forfeiture because she relinquished her right to the money when she gave it to Oscar Belvin. In this case is that the money was for Dominique and I didn't expect it back, and that is a relinquish of the rights. The trial court properly rejected Mary Belvin's contention that she was the owner or held an interest in the money.

MR. DAVIS: In brief response to thai;; Your Honor, I think it's clear she didn't say she just gave it to him, she gave it to him for the purpose of education. Had he dropped out of school I think the reasonable inference would be that money would come back to mom. It wasn't just given carte blanche, and that is what she testified to. So she never did relinquish it. It wasn't in a bailee, bailor situation.

THE COURT: Thank you, Mr. Davis. Go ahead, Mr. Hing

.

MR. HING: There is another case, Crenshaw v. the State of Georsia. Crenshaw is a very short case. It is 206 Georgia Appeals 271. It's a 1992 case. In that case a sale of cocaine was made, the state filed a complaint for forfeiture of money. The Intervenors . . . Carmen Crenshaw, ... claimed the money found on Tucker at the time of arrest. . . .
During the trial the judge directed a verdict for the State on the basis that the appellants lack standing to assert a claim against the property because they have no legally cognizable interest in the property.
As we recognized in Chester v. the State of Georgia . . . (t)here is no plethora of appellate decisions in

Georgia on this issue, but it is clear that to have standing to contest a forfeiture a party must have at least some property interest in the subject matter of the condemnation proceedings. That interest may be one of ownership, lease holder, or secured party, but there must be some substantial interest. Accord State v. Jackson. We are presented here with the issue of whether a general unsecured creditor -- as here -- has an interest sufficient to confer standing in a forfeiture case concerning money loaned to another. We hold that a general unsecured creditor does not have a legally cognizable interest sufficient to grant it standing to challenge the forfeiture action against the seized property. (sic) All the money found in defendant's purse in ~loodworth's case was In close proximity, was subject to forfeiture even though defendant presented evidence that most of the money loaned was for legitimate purpose of paying debt.

One who lends money to another, even though the funds may be loaned only for a particular purpose, the creditor has no right to exercise dominion or control over the money lent.

In this case she gave the money to her son, according to her, for a particular purpose. And that purpose was to ensure that -- And that purpose was to, according to her, to be a school fee. The travesty of it is this, that there is no way in this world 9 or the next that she can say that those monies are her's. In fact, part of the money was from in a safe and part i side a bedroom with that 140 bucks (sic). That is 7 consistent with the same money and the same domination. Which is more consistent, drug money or money that she gave him? But she didn't give him that money. She gave him a check according to her and cash. And out of that money was spent. The thing is she had divested control of the money to him. What she has perhaps if she did give him

money is a right of action against him to cover the money that he did not spend if that is so. But the thing is she has divested herself of the money
So the situation is this, that in relation to the money, it was found inside a closet in a safe with some marijuana residue in close proximity to about five pounds of marijuana packed in a way that is for sale with a scale all ready with a nice precision scale to ensure correct measure when we are selling our marijuana. There is no doubt in my mind that the money is contraband, and the thing is that in relation to her she then has no standing to controvert the forfeiture and she has no expectation of privacy in the premises. Lack of standing precludes the Court from considering the claim. That ' s what the authorities say. If the Court wants authority for that there are so many, including those that I've just given the Court. There are some others.

THE COURT: What about Mr. Stovall, he has a claim.doesn't he?

MR. HING: No, the thing is -- this is one of the problems about the bailee people. You see if a person is saying that he holds money as a bailee, what does he hold, the money in specie or does he commingle it with his own money, or does he use it as he likes. The thing is if he uses all the money that you gave him and then he replaces it, does that make the money replaced clean money, especially in these circumstance? You see, Your Honor, we are being asked to make a serious quantum leap.
The amount of drugs is clearly not for an ordinary person. This is five pounds at least of 'marijuana. We are talking about a big player. We are talking about the money found in a safe where there is residue. In fact, Your Honor, as Your Honor knows in Salem v. the State

and several others. You know the fact that even though less than an ounce or less than four grams are found in connection, that's small amount inside a safe raises a presumption that the money was used to facilitate. Your Honor knows the section, 16-13-49(s) . Your Honor is aware of it because the whole point of the statute is that we are not going to let contraband sit back and llow people to make these false claims that they own
property in contraband. The money because its proximity --

THE COURT: All right, let's deal with the search. I think the more troubling issues from your standpoint would be the search.

MR. HING: Mow, let us look at the search. When they went in pursuant to the arrest warrants, well, Your Honor knows they can't break down the door, but, you know, they can look in any place in which an (unintelligible) may be secreted. If you go inside of a premises --

THS COURT: Is there a case on that?

MR. HING: I'm sorry.

THE COURT: Is there a case on that?

MR. HING: Yes, but I thought it was tried law where I didn't bring it. I am not one to walk without a case, but I thought it was really tried law.

THE COURT: Well, I --

MR. HING: Let me develop it.

THE COURT: Okay. You go ahead.

MR. HING: If necessary I'll mail it to the Court. It's like in the cases where we are the immigrants including my own self. In reality we smuggle people across the border. I came bye here legally. But justsmuggle them across the border and you stop the vehicle and you're searching for immigrants. In that case, you search everywhere, the trunk, every where a person could hide. If, for example, you're searching a vehicle because it's marijuana --

THE COURT: We're not talking about a vehicle

MR. HING: No. No. I just using it.

THE COURT: We're talking about a dwelling and dwellings --

MR. HING: It's the same context. You're looking --

THE COURT: No, sir. It's not. It's not. A dwelling is different. Now, if you've got a case that says you --

MR. HING: No, I'm coming --

THE COURT: Let me finish the question, please, Mr. Hing. I am concerned about the fact that they solicited the assistance of the apartment manager to gain entry. They had an arrest warrant. They didn't have a search warrant; and it may just be plain as day but sometimes it take a great mind to perceive the obvious and it does not seem that obvious to me that they could do as they have here without more than an arrest warrant.

So I'm just -- I hear what you're saying. I see the analogy to a motor vehicle but I don't think it obtains to a private residence.

MR. H ING: When they were searching the residence, they had a right to look where the defendant could be found, and they have a duty so to do. The authorities on that are clear. The thing is -- I

THE COURT: Detective Fitzgerald said they were looking for the defendant or anyone else.

MR. HING: Or anyone else because --

THE COURT: That suggests they were conducting a search.

MR. HING: No. If anybody else in the house. They have to make sure that they are protected and safe.

THE COURT: Well, I want to give you an opportunity because this may have been an issue that you didn't anticipate. I want to have some cases that -- and I'm not saying that's not the case. I just -- you know I've not been on the bench for that many years and I just have a concern about that, so I want you to -- I'd like to ask that you address that concern by providing some cases I that-Would suggest that they -- and I can read 17, the I code section I cited, 17-4-3, but the annotations don't really seem to describe much of what that means.

MR. HING: All right. I will do my research and I provide it.

THE COURT: I would appreciate that. I

MR. HING: But --

THE COURT: Then let's talk about this other deal with this other search because this affidavit on this - -

MR. HING: You mean the one in Barrow?

THE COURT: -- Barrow County case is a little thin. It's a little thin.

MR. HING: Whether the Barrow search is good, bad or indifferent, we have two things to consider. One, there is the duty of the Athens police when called upon to assist another officer in execution of an arrest warrant. In fact, Your Honor, if they do not assist, they commit an offense.

THE COURT: Well, I'm not sure you' re missing the point that --

MR. HING: I'm getting --

THE COURT: The point the Court is asking is if there was not -- if the probable cause was lacking from -- and this was not a search based on reasonable cause that led to the arrest warrant being issued, then it doesn't matter whether they were called to assist or not there was not a legal basis for them to execute an illegal arrest warrant.

MR. HING: You are -- I know where you're coming from, Your Honor. You're looking at Boatwright v. the State. That three court (sic) decision which is not binding on authority but that is Boatwriqht and they extended everything in that one. But I will address it in this way. Whether or not the search in Barrow County

was based upon a warrant that was not supported by a PC, whether that was so or not, one thing is clear, the two arrest warrants in this case are legal and valid on the face of it. I don't think there is any contradiction about that. The warrant as it appears are legal and valid on the face of it. The warrant for the arrest of the young man.
As a consequence of that warrant being issued, as the Court is aware anybody, citizen or otherwise, can be called to aid in the execution of that warrant because a police officer cannot be asked to make a decision whether the warrant is valid or invalid. His only duty is to execute it. And --

THE COURT: That begs the question of whether or not there was -- it was legal or not.

MR. HING: I'm coming to that, Your Honor. The case of Ormond v. Ball, 120 Georgia 916. It's an old authority of great antiquity but good lawyers were practicing and we had a very strong court at that time. In that case, may it please the Court, the issue was whether or not the JP had authority to punish for a contempt arising out of an issuance of a warrant even though the warrant may have been issued by him.

THE COURT: I don't think there's any question that the officer had the -- you know he can't question the arrest warrant.

MR. HING: Right. And the thing is that if he does not execute the warrant if a justice of the peace Issues a warrant and the officer refuses to execute it, then the same justice who issued the warrant although he has no other, another, issue a warrant for his arrest and the

withdrawal of the warrant from the office and placing of it hands it with instructions to execute it and is refused to do so constitute in each incident a separate offense .

THE COURT: Well, that's not the issue here. The issue --

MR. HING: No, I'm coming to that, Your Honor. So what you have Newkirk v. the State is in the same 57 Georgia Appeal 802. It's in the same line. He is bound to execute penal warrants in his hands. Newkirk v. State, 57 Georgia Appeals 803. That's a little earlier, 1913. Both cases are the same, that the officer is bound to execute a warrant. The purpose of my putting that case before the Court Is this, that when the officers from Athens county went to 120 Chateau Place they went there under the belief, bona fide belief, that they had a warrant that was good for the arrest of Demond Stovall.

IN THE COURT OF APPEALS

STATE OF GEORGIA

STATE OF GEORGIA	:	
	:	
Appellant	:	
	:	CASE NO: A05A0867
	:	
v.	:	
	:	
JUDY RICHARDSON	:	
DEMOND L.	:	
STOVALL,	:	
	:	
Appellees.	:	

BRIEF OF APPELLEES

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STATE OF GEORGIA

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	:	
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	:	
Appellees.	:	

BRIEF OF APPELLEES

I.

Statement of Facts

Many of the facts set forth in the Appellant's Statement of Facts are correct. However, in addition to the facts set forth by the Appellant, it is important to note that the Superior Court of Athens-Clarke County, Georgia, in the case of State of Georgia vs. Demond Stovall, case number SU-03-CR-1231J, entered an order suppressing the evidence in the Superior Court of Athens-Clarke County, which was filed November 21, 2003. A copy of that order is found at p. 138-p.141 in the record on appeal. In addition, the fact is that on May 7, 2003, the State of Georgia filed a Complaint for Forfeiture, which is involved in this litigation. Judy Richardson filed an answer and claim on June 5, 2003. A hearing on the rule nisi for the Motion to Suppress was set for August 6, 2003, but was changed to July 1, 2003. On September 15, 2003, the Motion to Suppress hearing was

rescheduled. The actual hearing and the first hearing on the trial of th[illegible]feiture case was not set until September 15, 2003, whi[illegible]as more than sixty (60) days after the answer was filed. It is undisputed also that the State asked for a continuance of a hearing that had not even been set. (R15-115)

On March 30, 2003, law enforcement officers with the Barrow County Sheriff's Office to include Detective Ben Ewing conducted a search at 911 Justin Drive in Statham, Georgia. He ostensibly obtained a warrant on the same date from Sonya Davis, a part-time magistrate of Barrow County. Although this alleged warrant is nowhere to be found and was never proven to exist, there was an affidavit for search warrant made by Ewing to Davis for 911 Justin Drive. Portions of the information in the warrant were gained during an illegal stop and detention of Stovall shortly prior to this date. Ewing and other officers made entry into 911 Justin Drive and located alleged contraband to include marijuana. Ewing determined that 911 Justin Drive was a residence belonging to Stovall and made application for and was issued arrest warrants for Demond Stovall on March 31, 2003. Ewing then proceeded to 130 Chateau Terrace, apartment 20 in Athens along with Athens-Clarke County officers to include Chris Fogel. This residence was found to also belong to Stovall as was testified to by his mother and by Fogel. The officers retrieved a key from the apartment personnel and entered the apartment. After entering apartment 20, they proceeded to search the residence and located alleged marijuana. The officers' search included breaking open a locked closet that was secured with a lock on the outside. A safe and a bag were located therein. These officers then again ostensibly obtained a warrant dated 21 March 2003 with an application for search warrant dated 31 march 2003 utilizing the evidence located from the earlier entry into the apartment. A quantity of marijuana was then

located in the bag from the closet along with cash.

ARGUMENT AND CITATION OF AUTHORITY

1. **THE SEARCH AT 130 CHATEAU TERRACE APT. 20 AND THE SEIZURE OF ALLEGED MARIJUANA THEREFROM WAS FRUIT OF THE POISONOUS TREE.**

Georgia's exclusionary rule is codified at OCGA 17-5-30, and it provides for the suppression of evidence obtained by an unlawful search and seizure conducted either with or without a warrant. Boatright v. State, 225 Ga. App. 181 (1997). There is no good-faith exception to this exclusionary rule in Georgia. Id. *citing* Gary v. State, 262 Ga. 573, 574 (1992). Gary involved a warrant issued by a Jackson County magistrate authorizing the search of a house that was not supported by probable cause.

"The introduction of evidence obtained by officers reasonably relying on a warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause" has no application in Georgia jurisprudence due to the legislative mandate of OCGA 17-5-30. Boatright at 183 *citing* Gary.

In Boatright, a case directly on point to the issue in the case at bar, the defendant was stopped and illegally frisked by law enforcement officers. This illegal frisk resulted in the seizure of marijuana from the defendant. Learning of the marijuana traffic stop, defendant's probation officer issued a probation warrant for his arrest. Upon his arrest of defendant at his home on this probation warrant nine days after the illegal frisk, defendant consented to the search of his home and marijuana was discovered therein.

The Boatright court ruled that the probation warrant reasonably relied upon by the arresting officers was invalid because it resulted directly from an illegal search. Id. at 183 referring to Jones v. State, 126 Ga. App. 841 (1972) (fruit of illegal search cannot be used as basis of arrest). Applying

the rule of Gary, *supra*, the court held that no evidence obtained as a result of the illegal warrant could be introduced against Boatright at trial. Id. at 183.

The Boatright court went on to distinguish its case and Gary from Harvey v. State, 266 Ga. 671 (1996) wherein a defendant was arrested on a bench warrant that had been recalled, yet the arrest was valid. Boatright, like Gary, involved a search of the home, not a search of a person in a public place as in Harvey. Moreover, in Boatright it was the affirmative acts of the police themselves which invalidated the warrants, unlike an administrative computer glitch in Harvey. Id. at 184. The affiant for the warrant in Gary did not present sufficient facts to establish probable cause, and the officer who searched Boatright in the traffic stop did so illegally. Id. at 184.

In the case at bar, the Barrow County officers including Ewing did not present sufficient facts to establish probable cause for the issuance of any search warrant at 911 Justin Drive, Statham. Therefore, the marijuana seized from that location was illegally seized and the warrants issued from the discovery of contraband at 911 Justin Drive were illegal. Furthermore, these illegal warrants caused law enforcement to enter 130 Chateau Terrace, apartment 20, said entry resulting in the discovery of marijuana that led to the issuance of the Clarke County warrant. This discovery and seizure of contraband at 130 Chateau Terrace, apartment 20 was fruit of the poisonous tree.

Another case on point comes out of Barrow County. In State v. Dukes, 243 Ga. App. 343 (1998), the court upheld the trial court's ruling that the seizure of 59 rocks of crack cocaine made during the arrest of defendant upon the execution of an invalid parole warrant was fruit of the poisonous tree and therefore should be suppressed. A warrant which was invalid because it was based on an unlawful search cannot serve as probable cause to arrest. Id.

citing Boatright. Unlike the valid warrant which was issued in Harvey, but later recalled, the warrant in this case was invalid from the day it was issued. Id. at 151.

In the forfeiture case at hand, the search was unlawful as the application for warrant was devoid of probable cause. So, the arrest warrants were invalid and could not provide probable cause to arrest Stovall. Clearly, the subsequent entry into his apartment based upon those arrest warrants and the discovery of alleged contraband used to form the basis of probable cause for the warrant issued after said entry into his home was illegal. Everything located at 130 Chateau Terrace, apartment 20 was fruit of the poisonous tree.

2. **BURDEN OF SHOWING THE LAWFULNESS OF THE SEARCHES IS ON THE STATE AND THE STATE FAILED TO MEET THE BURDEN.**

In a hearing on a motion to suppress evidence illegally seized, the judge shall receive evidence on any issue of fact necessary to determine the motion; "and the burden of proving that the search and seizure were lawful shall be on the state". OCGA 17-5-30(b). The Boatright court found that although it was incumbent upon the State to prove the legality of the searches, it failed to carry its burden.

In this case, the state failed to introduce any evidence of the occurrences in Barrow County. It repeatedly refused to go forward with its burden. They failed to present any warrants for the searches in Barrow County or to prove the legality of the searches.

3. **THE APPLICATION FOR SEARCH WARRANT IN BARROW COUNTY WAS DEVOID OF PROBABLE CAUSE.**

The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating law enforcement officers gain as a result of an illegal arrest taking place in the home should be excluded to deter such

conduct. Boatright, supra, *citing* Carranza v. State, 266 Ga. 263, 268 (1996).

In determining the sufficiency of an affidavit to support the issuance of a search warrant, Georgia courts employ the totality of the circumstances analysis enunciated in Illinois v. Gates (citation omitted) and adopted by the Georgia Supreme Court in State v. Stephens (citations omitted) *with the admonition that prudence counsels that Gates be considered the outer limit of probable cause.* Christopher v. State, 245 Ga. App. 862 (2000)(emphasis added).

The court in Christopher went on to affirm the trial courts finding that the issuing magistrate had a substantial basis for concluding that probable cause existed. The search warrant issued for the search of the defendants home was based on an affidavit concerning a suspected marijuana grow operation. The affidavit contained the following information: (1) the affiant had been with the GBI for 12 years and conducted numerous marijuana investigations; (2) defendant was seen leaving Atlantis Hydroponics in Athens *with a lighting device commonly known by law enforcement personnel to be used to cultivate marijuana;* (3) defendant home had 2 electric meters connected to the residence, and the house appeared to be heated by propane gas; (4) the power bills for one account at the residence showed an increase in power bills outage by 354 percent; (5) the other account showed the power bill doubled; (6) an exaggerated power bill is consistent with the enterprise of growing marijuana with indoor lights; (7) equipment known to be commonly used to grow marijuana indoors to include PVC piping, water hoses running to the basement, a rusty air tank with copper tubing going into the basement window, and a crude ventilation system out of the basement window was observed at the defendant residence; (8) a FLIR was used to show unusual heat emitting from the home; (9) defendant

had a landscape business unfamiliar to the Department of Agricultural Plant Protection Division; (10) the vehicles of 2 persons with a criminal history of marijuana use and distribution were at defendants home on several occasions; and (11) a Ryder truck was at the residence. McClure further found from the local manager of the garden center that (1) it was not economical advantageous for a small operation to use hydroponics equipment; (2) there is no commercial use for hydroponics in a landscaping business; (3) carbon dioxide is a stimulant for plant growth but not economical for commercial production; (4) the manager had never seen carbon dioxide used for a small plant production company; and (5) during his 12 years in law enforcement, affiant had only seen hydroponics equipment and carbon dioxide used for the indoor production of marijuana. Id. at 864.

The affidavit in the case at hand is a far cry from that in Christopher. As Gates is the outer limits of probable cause, the warrant in the case at hand fails to even attain the reasonable articulable suspicion standard. Georgia jurisprudence is clear that a home is afforded considerably more protection from searches than do vehicles. The discussion in Harvey, Gary and Boatright, *supra*, amplify this.

The elements included in the affidavit of this case have been found insufficient to support the search of a vehicle by the appellate courts of this state. Surely, they fail to establish probable cause to search a home.

The fact that Stovall was allegedly seen by Fogel leaving the hydroponics shop, but without any items as in Christopher is significant. Even if he had been seen with equipment, it is clear from Christopher that would not be enough. More importantly, because Fogel had obtained a search warrant for 130 ChateauTerrace on 17 February 2003 based on seeing Stovall leave Atlantis Hydroponics, it is fair to say that Fogel was on a fishing expedition. Unable to gain

any FLIR readings from the Athens apartment, Fogel then told Barrow County to watch out for Stovall.

Barrow County then saw Stovall 911 Justin Drive in his mother's car. He was seen leaving the house with a white plastic bag that he placed in the trunk. The officer had no way to determine what it may have contained. In State v. Nichols, 196 Ga. App. 709 (1990), law enforcement listened in to a telephone conversation where a suspect, who had sold drugs to an agent on 2 occasions, was speaking with another male allegedly setting up a buy. Officers were looking for the suspect's supplier. Defendant and suspect arrived at the location officers heard described on the telephone intercept and observed defendant hand suspect a white paper bag. Shortly thereafter, suspect handed suspect what appeared to be money. The court affirmed the granting of the motion to suppress based upon absence of probable cause. Also, in State v. Wells, 153 Ga. App. 308 (1980) the court found there was insufficient information to search defendant's car based upon the statement of an informant that defendant tried to sell informant marijuana where he did not see the marijuana.

Stovall was then stopped by law enforcement reportedly for weaving. Even if this were the true reason for the stop, the detention of Stovall and questioning about the house was well beyond the investigation of the reason for the stop, thus is itself illegal and suppressible. In Gonzales v. State, 255 Ga. App. 149 (2002) the defendants were stopped for an obscured tag. Yet, the officer's questioning of the defendants concerning possession of contraband and searching their vehicle after the conclusion of the investigation related to the reason for the stop exceeded the permissible scope of the investigation and constituted an illegal detention. The drugs found were suppressed.

Likewise in State v. Gibbons, 248 Ga. App. 859 (2001), the trooper's detention of defendants while asking

them questions after stopping them for a seatbelt violation was unauthorized, where the questions were not related to the violation, the trooper held license while he asked unrelated questions, and defendants were not free to go. Again the same issue arose in State v. Cooper, 260 Ga. App. 333 (2003), where in the court ruled that a new investigation for contraband was not supported by reasonable articulable suspicion just because defendant appeared nervous after being stopped for tag light out and weaving.

Stovall was clearly detained illegally. He refused to consent to a search of the car, yet the officer detained him while attempting to get a drug dog on the scene. Anything Stovall may have said or done is inadmissible. Regardless, his lawful right to refuse a search is no grounds to be used to support a warrant.

Also, even assuming *arguendo* that the stop was legal, no support from a warrant was derived therefrom. In State v. Thompson, 256 Ga. App. 188 (2002), defendant's nervousness and the smell of dryer sheets, alleged to mask the smell of marijuana, did not provide reasonable articulable suspicion to continue the investigatory stop. If that is not enough for a second tier detention, then what is in the warrant must fail to provide probable cause for the search of the home.

An important element missing in the investigation was any corroboration. Ewing testified that 911 Justin Drive belonged to Stovall. He verified this only based upon the search af the residence. Never prior to obtaining the warrant did he go to the utilities or tax office to ascertain who lived there. Even the neighbors did not know who lived there according to the affidavit. Facts as simple as who lives at or owns the house should have been corroborated among other things. *See, e.g.* Shivers V. State. 258 Ga App. 253 (2002).

ENTRY INTO 130 CHATEAU TERRACE

APARTMENT 20 WAS ILLEGAL BECAUSE OFFICERS HAD NO REASON TO BELIEVE DEFENDANT WAS PRESENT WHEN THEY ENTERED.

Again, assuming *arguendo* that the arrest warrants were valid, the police did not have probable cause to believe that Stovall was in the apartment. "Possessing an arrest warrant and *probable cause to believe (defendant) was in his home*, the officers were entitled to search anywhere in the apartment in which (defendant) might be found. (Until) he was found, ... the search for him was (not) over, and there was (still) that particular justification for entering any place that had not yet been searched." State v. Wright, 204 Ga. App. 382, 383 (1992) *citing* Maryland v. Buie, 494 U.S. 325, 332-333 (1990)(emphasis added.) Wright is an interesting case where a Federal warrant was valid for the arrest while a Dekalb County warrant was invalid. Because the Federal warrant was valid, it provided an independent source for the arrest. Importantly, the court ruled it was proper for an agent to move a duffel bag in the attic to look for defendant.

Distinguishing our case, there was no information that law enforcement possessed to provide probable cause that defendant was in the apartment at the time they entered. Thus, entry was illegal. Also, the fact that the closet door was deadbolt locked from the outside defeats a claim that law enforcement believed Stovall was hiding on the inside. Thus, entry into the closet was also illegal and the fruits thereof inadmissible.

In addition, no hearing on the forfeiture case was set for sixty (60) days and the Claimant, Judy Richardson, was entitled to a judgment in her favor upon the failure of the State to conduct a hearing within sixty (60) days of her answer. O.C.G.A§16-13-49(o)(5); Henderson v. State, 205 Ga. App. 542 (1992) affirmed 263 Ga. 508 (1993). Furthermore, Jackson v. State, 212 Ga. App. 340, held that it

was error to grant the State a continuance where the State had failed to comply with the statutory time requirements applicable to the hearing on a forfeiture case in the first instance.

Furthermore, the doctrine of collateral estoppel applies when in a criminal case the same issues had been litigated and resolved against the State. The elements of collateral estoppel (1) There must be a full hearing (2) between the same parties (3) with a fact finder acting in a judicial capacity; and (4) the fact issue must be the same in both proceedings. Clearly, in the case at bar, the Motion to Suppress Evidence Illegally Seized in the criminal case against DeMond Stovall, in Athens-Clarke County Superior Court criminal case number:
SU-03-CR-1231J, which was filed on November 21, 2003, ruled against the State. That decision of the Clarke County Superior Court, all be it by a different Judge than the Judge in the civil forfeiture case, was not appealed, and is binding on the State. The Order of the Honorable Steve Jones, Judge, Clarke Superior Court, considered and addressed all of the issues raised by the State in our position to the Motion to Suppress Evidence and in a considered and thorough opinion, Judge Steve Jones, with the Clarke County Superior Court, after hearing all of the facts and law ruled that the search was unlawful. The Order on the forfeiture case wherein the trial Judge, Judge David Sweat, ruled on April 26, 2004, that the Motion to Suppress should be granted, was in fact collateral estopped. Although the Judge did not address the issues directly in terms of citations, it is clear that where the Appellant had a full and fair opportunity to litigate the Fourth Amendment issues during the Motion to Suppress in the criminal trial, it would be subject to the doctrine of collateral estoppel. In the case of Talley v. State, 200 Ga. App. 442, 408 S.E. 2nd 461 (1991) the Court held that the trial court did not err in applying the doctrine of collateral

estoppel in the disposition of a Motion to Suppress hearing in a main case when the Judge had previously decided in a probation revocation case the matter of the Motion to Suppress hearing in the main case, which had been decided adversely to the Appellant in the probation case. The State has cited only cases going the other way. That is, case wherein a defendant had obtained a ruling in a civil forfeiture case and then attempted to apply that to the criminal action. As the Courts have continuous held, decisions in civil cases, which are decided by a preponderance of the evidence are never, ever binding in a criminal case. Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be re-litigated between the same parties in any future action. Ashe vs. Swenson, 397 US 436, 90S.Ct. 1189 (1970). Clearly the State in the case at bar had an opportunity to present all of the facts which would support a theory that the search was lawful when it had a fair and full hearing in the criminal case against DeMond Stovall. The subsequent case in the forfeiture action, after the time for an appeal had expired and the State failed to appeal the Motion to Suppress, was clearly barred. Since the search, wherein the property sought to be forfeited in this case, was ruled illegal in the criminal action, several months before the disposition of the civil case and no appeal was taken from that ruling, the State is barred by collateral estoppel from once again litigating in the civil case the same issue, between the same parties, involving the same facts which was heard in the same Court.

In addition, in the case of Phillips v. State, 167 Ga. App. 260, 305 S.E. 2nd 918 (1983) the Court held that where a seizure was a direct result of an illegal intrusion into defendant's premises, there was no valid reason for seizure of the property and the evidence from the illegal seizure was inadmissible in the criminal trial. Clearly in the case at bar

the illegal intrusion into Defendant's premises resulted in there being no valid reason for seizure of the property sought to be forfeited in the case at bar and once again the collateral estoppel doctrine would prevent the forfeiture.

In the case of Lang v. State, 168 Ga. App. 691, 110 S.E. 2nd 276 (1981) the Court of Appeals held that where the Claimant in a forfeiture case did not collaterally attack the denial of a Motion to Suppress in the related criminal proceeding, that the Claimant was collaterally estopped from challenging, in the forfeiture proceeding, the denial the Motion to Suppress Evidence which had been entered in the criminal proceeding against the Claimant. Clearly, without regard to which direction the Court went in the criminal case, it would have been a collateral estoppel in the civil forfeiture case which followed by several months, and which followed the criminal ruling which was not appealed and not attacked by the Appellant.

Although the trial court did not address the issue of collateral estoppel except cursorily, the Court should have granted the Defendant's Motion for Judgment based on collateral estoppel and based upon the fact that the State has no case whatsoever to cite to any court, this Court, or the trial court, wherein a ruling in a criminal case, which was not appealed, was not binding in a civil forfeiture case. The only case law in existence is the other way around. That is the case wherein a probation revocation ruling on a Motion to Suppress was binding in a criminal trial court as mentioned above.

For all of the reasons the trial court did not err and should be affirmed.

This 17th day of February, 2005.

Respectfully submitted,

/s/ James W. Smith

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IN THE SUPREME COURT
STATE OF GEORGIA

[received and filed by hand delivery Jan. 03, 2005]

JUDY RICHARDSON and DEMOND L. STOVALL, Applicants,	:	CASE NO: A05A0867 (Court of Appeals)
v.	:	
STATE OF GEORGIA	:	
Respondent.	:	

APPLICATION FOR WRIT OF CERTIORARI

COMES NOW Judy Richardson and Demond L. Stovall, who by and through their attorney ask that the Writ of Certiorari be issued to the Georgia Court of Appeals from this Court in the above-styled action, and respectfully show this Court as follows:

TYPE OF CASE

This is an application for a writ of certiorari to the Court of Appeals, pursuant to Supreme Court Rule 38. The underlying case sought to be brought up from the Court of Appeals is a forfeiture action.

JUDGMENT APPEALED AND DATE OF ENTRY

The Court of Appeals entered its order denying applicant's motion for reconsideration on December 12, 2005. The appeal was initiated by the State and involved the denial by the trial court, after a bench trial, of forfeiture as sought by the State for $10,720 in U.S. currency.

STATEMENT OF FACTS

On May 7, 2003, the State field a Complaint for

Forfeiture in the Superior Court of Clarke County, State of Georgia. (R.4). Amongst other property, the Complaint sought the forfeiture of $10,720 in U.S. currency, seized during a search at 130 Chateau Terrace, Apartment 20, Athens, Clarke County, Georgia. (R.5). The State alleged that the property was subject to forfeiture under O.C.G.A. § 16-13-49. Id. The State also noted that possible owners and interest holders included the Applicants here, and listed Demond L. Stovall as residing at the same address where the money was seized. (R.5-6).

Applicants' response included a Motion to Suppress Illegally Seized Evidence and a Motion for the Return of Property, file June 5, 2003, stating *inter alia* that the search was illegal. (R.13). Attached to that Motion were documents relating to another search and seizure of property involving Mr. Stovall in Barrow County as well. (R.21-31). Judy Richardson also filed a verified Answer to the State's Complaint, filed June 5, 2003. (R.32). This answer raised the Fourth Amendment issue. (R. 32-33). The hearing on the matter was rescheduled many times as can be seen on the record. The State eventually obtained a continuance on July 17, 2003, further delaying the proceeding. (R.60). Ms. Richardson Amended the Motion to Supress and for Return of Property on August 20, 2003, adding that the search warrants were not even issued by a magistrate as authorized by O.C.G.A. § 15-10-20. (R.70, 76).

On September 8, 2003 Petitioner Demond Stovall filed his Motion to Suppress Evidence Illegally Seized and Motion for the Return of Property in Athens-Clarke County, stating *inter alia* that the search was illegal. (R.78). Mr. Stovall also filed his verified Answer and Claim to the State's Complaint for Forfeiture on September 8, 2003.

On September 11, 2003, the State filed its Objection to claimant's motion to suppress.

On September 19, 2003, Mr. Stovall filed his objection to

the Continuance and requested a ruling on the Motion to Suppress. (R.108). Then, on September 22, 2003, Ms. Richardson filed a Motion to Dismiss the Complaint and have her property returned. (R.113). On September 26, 2003, a hearing was held in the case. (T.cover). A Ruling was not handed down until sometime after that, as discussed below.

The next significant procedural event was Mr. Stovall's Motion for Judgment filed January 7, 2004. (R.136) In this Motion, Mr. Stovall, through his attorney, showed that the Honorable Steve Jones in Athens-Clarke County granted a Motion to Suppress in his case (the criminal action against Mr. Stovall), and that was res judicata in the Athens-Clarke County Case. The Honorable Judge Jones held that the only reason a warrant was issued for a search of Mr. Stovall's residence at 130 Chateau Terrace was due to contraband **illegally** found at 911 Justin Drive in Barrow County. (R.141). The State then failed to prove that the evidence obtained at 130 Chateau Terrace came about by means "sufficiently distinguishable to be purged of the primary taint." Id. Consequently, **both searches were illegal.** Also of note at this point is that the forfeiture action in Barrow County had been dismissed by the State itself all the way back in September of 2003. (Exhibit B).

In an Order issued on April 23, 2004, Honorable Judge David Sweat in the Superior Court of Athens-Clarke County found that **both** Claimants (Applicants here) had standing to contest the Complaint in forfeiture because each had established some property interest in the subject matter. (R.149). The Court also found that **both** searches - that of 911 Justin Drive and of 130 Chateau Terrace were illegal. So for the second time, a trial Court found both searches to be illegal.

Although the Court did not explain in detail its finding as to why each claimant had standing, it would appear from the

transcript that as least as to Ms. Richardson, she had the status of a bailor and Mr. Stovall that of a bailee (this was how the Court of Appeals seemed to take the ruling). At the same time, given the Court's finding of fact that the searches were illegal, it would also seem that Mr. Stovall at least had standing as the *resident* of the property where the money was found. This interpretation of the facts of the trial Court's opinion is supported by the choice of wording used by the Court - the words "subject matter," as opposed to "property." (R.149). The words "subject matter" are clearly broader, and meant to encompass the scope of the action, including the illegal search. This interpretation of the trial Court's holding is further supported by the transcript, where it is apparent that Judge Sweat was very concerned about whether or not the searches were legal. (T. 181-82, 184-86, 191). In summary, according the Trial Court, Ms. Richardson had standing because of her status as a bailor of the money, and Mr. Stovall had standing for **two** reasons - as a bailee of the money, and also as the *resident* of the property where the money was found, his dwelling place.

After the ruling, the State timely filed for appeal to the Georgia Court of Appeals, arguing that the trial Court erred in finding that both Ms. Richardson and Mr. Stovall had standing to contest the forfeiture, and that the Court erred in finding that the search of the apartment at 130 Chateau Terrace was invalid. The Court of Appeals, in its opinion, found that Ms. Richardson and Mr. Stovall did not prove a property interest in the money because there was insufficient evidence to establish a bailor-bailee relationship as to the money. Specifically, the Court of Appeals held that even though there was testimony by Ms. Richardson that she had withdrawn $15,000 from her 401k account to pay for her younger son's college in April of 2002, there was insufficient evidence to show that the $10,720 seized at Mr. Stovall's dwelling and place of residence was in fact part of that same

$15,000. (Ga. App. Case No. A05A0867, 6-7).

The Court of Appeals also held that Mr. Stovall had no standing to contest the seizure of the funds, claiming that the only basis upon which Stovall claimed an interest in the seized funds was as a bailee, and that he offered no evidence whatsoever to establish an interest. Id. at 8. Of course, Mr. Stovall had also contested the seizure based not merely on his status as a bailee, but also that the seizure violated his Fourth, Fifth, and Sixth Amendment Rights under the Constitution of the United States, and under Article I, Section I, paragraph XIII of the Georgia Constitution. (R.87). This shows that he contested the search's legality in his Answer to the Complaint for forfeiture, under a notice pleading standard used in civil cases. Also, in his Answer, Mr. Stovall specifically denied the legality of the search, which would also put the state on notice of this potential grounds on which to contest the seizure. (T.88). Coupled with the reasonable reading of the trial Court's Order and hearing that Mr. Stovall was found to have standing both as a bailee and as a resident whose home and property was unlawfully searched and seized. Mr. Stovall did indeed rely on more than just his status as a bailee to contest the forfeiture: he also relied on the fact that his dwelling, where the money was found, and he resided, had been searched illegally.

Also of note is that Mr. Stovall argued the illegality of the search on appeal, noting

> "Clearly, the State in the case at bar had an opportunity to present all of the facts which would support a theory that the search was lawful when it had a fair and full hearing in the criminal case against DeMond Stovall. The subsequent case in the forfeiture action, after the time for an appeal had expired and the State failed to appeal the Motion to Suppress, was clearly barred. Since the search, wherein the property sought to be forfeited in

this case, was ruled illegal in the criminal action, several months before the disposition of the civil case and no appeal was taken from that ruling, the State is barred by collateral estoppel from once again litigating in the civil case the same issue, between the same parties, involving the same facts which was heard in the same Court." (Appellee's Brief to the Court of Appeals at 12-13, attached as Exhibit A).

Despite arguing that Mr. Stovall had standing because of the illegal search, and despite the opinion of the trial Judge that he had standing because of the illegal search, the Court of Appeals, has previously stated, held that the only grounds upon which Mr. Stovall contested the forfeiture was as a bailee. Apparently, the Court of Appeals completely ignored the pleadings, the transcript, and the breifs. Furthermore, the Court of Appeals Expressly declined to reach the issue of the constitutionality of the search at all. (Ga. App. Case No. A05A0867, 9).

ENUMERATION OF ERROR

I.

The Georgia Court of Appeals committed error by allowing money seized in an illegal search to be forfeited to the State, and not returned to the resident of the dwelling from which the money was seized.

II.

The Court of Appeals committed error by making findings of fact contrary to that of the trial Court Judge, in violation of the any evidence rule.

III.

The Georgia Court of Appeals committed error when it declined to rule on the constitutionality of the search and seizure, a material issue in the case, before reaching the issue whether or not the Applicants had the status of bailor and bailee with regards to the seized U.S. Currency.

ARGUMENT AND CITATION OF AUTHORITIES

I. THE GEORGIA COURT OF APPEALS COMMITTED ERROR BY ALLOWING MONEY SEIZED IN AN ILLEGAL SEARCH TO BE FORFEITED TO THE STATE, AND NOT RETURNED TO THE RESIDENT OF THE DWELLING FROM WHICH THE MONEY WAS SEIZED.

The Standard of Review for this enumeration of error, an issue of law, is de novo.

Without a doubt, property that is seized in an illegal search and seizure must be returned. This is and has been the law of Georgia in the Court of Appeals for quite some time, and was even reaffirmed earlier this year. See Curry v. State, 271 Ga. App. 672, 677, 610 S.E.2d 635, 640 (2005) (*reversing the forfeiture of property seized at Curry's residence in what the Court concluded to be an illegal search*). Indeed, the Court of Appeals has held that property and evidence seized in an illegal search must be generally excluded from being entered into evidence, even in civil forfeiture proceedings. Woods v. State, 243 Ga. App. 195, 197, 532 S.E.2d 747, 750 (2000). (Also holding that the State, not the claimant, bears the burden of proof concerning the illegality of a search). The Fourth Amendment to the United States Constitution also provides protection against illegal search and seizure. In fact, to prevail on such a claim, a claimant need only prove that his legitimate expectation of privacy was violated by an **illegal** search or seizure. Kimmelman v. Morrison,477 U.S. 365, 374, 106 S.Ct. 2574, 2582 (1986). Hence, the test for standing to contest a forfeiture under the fourth amendment is to see if the claimant had a *legitimate expectation of privacy* where the search occurred. Of course, the High Court really doesn't even look directly at standing in these types of cases, but rather looks at the substantive rights granted by the

Fourth Amendment. Minnesota v. Carter, 525 U.S. 83, 88, 119 S.Ct. 469, 472 (1998). That case goes on to hold that in order to be protected by the fourth amendment:

> "a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Id.

Furthermore, the Fourth Amendment expressly protects people against unreasonable searches of the persons and houses. Id. citing Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Clearly there is a legitimate expectation of privacy in one's home, and the fourth amendment protects them from having anything taken. As shown above, this is not based upon some mere archaic property law notion of standing, but rather on the legitimate expectation of privacy a person enjoys in his own home.

But it's not even just the Georgia Court of Appeals, the U.S. Constitution, and the United States Supreme Court that gives a claimant in forfeiture protection in his own home (in which he has a *legitimate expectation of privacy*) from illegal search and seizure. The Constitution of the State of Georgia also provides very similar protection to that provided by the fourth Amendment of the Constitution of the United States. See Ga Const., Art. I §1 P. XIII. The Georgia Supreme Court, the Georgia Court of Appeals and federal courts applying Georgia law have all adopted the reasonable expectation of privacy approach. See Smith v. State, --- S.E.2d ----, 2005 W.L. 3295832 (Ga. App.2005); State v. McKinney, 268 Ga.App. 296, 601 S.E.2d 777, (2004) (**intrusion onto appellant's property was a violation of the appellant's reasonable expectation of privacy**); Davis v. State, 262 Ga. 578, 422 S.E.2d 546 (1992) (no expectation of privacy is more

reasonable than one's own bedroom); U.S. v. Chapman, 196 F. Supp.2d 1279 (M.D.Ga. 2002).

It is also clear that to contest a forfeiture, the owner or interest holder must have a legally sufficient claim. Baker v. State, 269 Ga.App. 722, 605 S.E.2d 126 (2004) (holding that where there was no evidence that the money seized in the car was in proximity to any drugs, where the money had been said to be acquired through employers, selling cars and through friends and family, there was at least enough evidence of a claim to support a hearing, even in the absence of detailed information as to the source of the money). Under Baker, a legally sufficient claim can be supported by general facts, and logically the state must bear the burden to prove their case under O.C.G.A. § 16-13-49 by a preponderance of the evidence. This would comport with the above burden of proof of the state to prove a search was legal to start with. See Woods, 243 Ga. App. 195. It also follows from the case of State v. Williams, 278 Ga. 447, where this Court held that the **forfeiture statute must be strictly construed against the state.** Of course, in order to carry the burden of proof, there must also be *some* evidence that the property should have been seized to start with.

A. The State has no evidence to support its claim for forfeiture, and never had any legal authority to take the property that is the subject matter of this action, and it must be returned to Mr. Stovall.

In the case *sub judice* there is absolutely no evidence to support the seizure of the property at Mr. Stovall's residence. Indeed, under the guidance of Woods v. State, 243 Ga. App. 195, all evidence seized during the illegal searches from which the State draws its case should have been excluded. This would include the alleged marijuana, the money, any property, and evidence of whether or not the cash seized was in close proximity to the alleged marijuana, and indeed what room it

was found in. This is all fruit of the poisonous tree, and is not admissible as evidence.

Furthermore, State v. Williams, 278 Ga. 447 demands that the forfeiture statute be construed against the State. Additionally, before the burden shifts to the Claimant to prove he is an innocent owner, the State must establish a prima facie case for forfeiture. See General Motors Acceptance Corp. v. State, 279 Ga. 328, 613 S.E.2d 641 (2005). With these considerations in mind, and the fact that none of the evidence from the illegal searches (as determined by two different Trial Courts) is admissible in the proceeding, the State could not possibly have established even a prima facie case. *There simply is no evidence to support the forfeiture.* The State can not produce anything to support the initial seizure and forfeiture of the property because the searches were illegal. O.C.G.A. § 16-13-49(d)(3) may allow property that "was, directly or indirectly, used or intended for use in any manner to facilitate a violation of this article or of the laws of the United States or any of the several states relating to controlled substances." But, in order to prove the property seized, namely the currency, was to be used in such a manner, there must be some admissible evidence that the money was there to facilitate such a violation. Since the searches are illegal, and nothing found in an illegal search can be used as evidence, there is no such evidence. Hence, **the State never had the legal authority to seize any property from Mr. Stovall's residence, because it was fruit of the poisonous tree**.

Since there is no evidence to support the State's seizure, and that seizure was the result of an unlawful search, all that is left is for Mr. Stovall to meet the test of Baker, 269 Ga.App. 722. Of course, it is clear that the authorities who seized the property have absolutely no claim. A "legally sufficient claim," as seen in Baker, may be established with some general facts. Such facts, as stated above, were present in the case *sub judice* - that Mr. Stovall was a bailee for the money. Also, as

will be shown, Mr. Stovall had a legally sufficient claim due to his legitimate expectation of privacy in his own home which was his castle.

B. <u>Mr. Stovall had a legitimate expectation in his own home which was his castle, and therefore had standing to contest the forfeiture because of the unlawful search of his home.</u>

But there is an even more compelling "legally sufficient claim" that Mr. Stovall can establish: his **legitimate expectation of privacy in his own home**. Mr. Stovall can have clear standing based on a substantive analysis of his Fourth Amendment (and also of course Georgia Constitutional) rights as mandated by the United States Supreme Court in <u>Minnesota v. Carter</u>, 525 U.S. 83. In the case *sub judice*, the source outside the fourth amendment from which this expectation and Mr. Stovall's standing springs is the fact that he was the resident of the property. This is a long recognized, traditional property interest - a man's home is his castle. He had a clear legitimate expectation of privacy, and where the State violated such expectation, they conferred standing upon Mr. Stovall to contest any action taken by them pursuant to that unlawful breach of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights. There can be no doubt that Mr. Stovall has standing to contest the search and the subsequent attempt by the State to take anything from his property, including the U.S. Currency in question here. Two different Courts found the searches illegal, the Court of Appeals declined to reach the issue, and in any case the State could never meet its burden of proof to prove that the searches were legal (and indeed has already failed twice).

If the Court prevents Mr. Stovall from getting property back from his residence that was wrongfully taken, it would violate his Fourth Amendment right to protection from unlawful search and seizure, his Fifth Amendment Right to Due Process (no taking without just compensation), the Excessive Fines clause,

and the Due Process guarantees of the Fourteenth Amendment which have since incorporated the Fourth Amendment. It would also require a finding against the clear binding precedent of the United States Supreme Court in numerous cases establishing a legitimate expectation of privacy in this type of situation. Clearly, the Court of Appeals erred in holding that Mr. Stovall had no standing. Under the holding of the Court of Appeals, if a person can't show an accounting for everything in their home, it could all be taken in an **unlawful** search by the State, and the resident owner would have no way to effectuate the return of the property.

C. <u>The Court of Appeals incorrectly stated that Mr. Stovall only contested the forfeiture as a bailee, despite having made his constitutional claims in both his Answer in his Brief</u>.

The Court of Appeals held, as discussed in the Statement of Facts, that Mr. Stovall only based his claim upon the funds as a bailee. Clearly, as shown there, that was incorrect. Mr. Stovall at all stages asserted that the search was illegal, and that he had a claim based on that illegal search. He did so in his Answer (R. 87) and also at length in his brief to the Court of Appeals. The only conclusion Appellant can draw from the record is that the Court of Appeals either did not read the pleadings and brief or chose for whatever reason to ignore his constitutional claims entirely in order to hold as they did. Mr. Stovall has brought up these issues numerous times, regardless of what the Court of Appeals erroneously seems to think. He met his burden to establish his claim when the searches were held to be illegal. His status as a bailee was but a mere alternative claim, and need not necessarily flow from the first.

Furthermore, the Honorable Judge David Sweat addressed these concerns in Court and in his Order, holding the searches to be illegal. The Judge likely did not elaborate on his findings of the illegal search because it seemed unfathomable that the

Court of Appeals would hold that the State may keep property seized in an illegal search as it did here[1]. Fortunately, as noted in the statement of facts above, the transcript had numerous references to concerns about the illegal search. Even though the State's counsel seemed to have difficulty understanding the Judge and his concern that an illegal search was a problem, it is clear that the Judge himself did understand and was appropriately concerned about the illegality of the search.

D. The Court of Appeals grossly misapplied *Bohanon v. State* to the case *sub judice*, misstated the holding of that case, and consequently committed reversible error in its analysis.

This does not end the error of the Court of Appeals on this Count. The Honorable Judge Bernes of the Georgia Court of Appeals cited Bohannon v. State, 251 Ga. App. 771, 772-772 (1), 555 S.E.2d. 112 (2001) in his opinion. He cited the case for the notion that a Defendant lacked standing to challenge the constitutionality of the search where the only alleged basis for standing was the existence of a bailor-bailee relationship. Richardson v. State, Ga. App. Case No. A05A0867, 9. This was as close as the Court of Appeals came to addressing the constitutional issue of standing. Unfortunately for the Court of Appeals, it missed some key facts concerning Bohannon. First of all, that case involved the search of the residence of a *third person*. Here, Mr. Stovall's own residence was searched - *he is not contesting his property being taken from someone else's house*. Rather, he contests the taking of property from his *own* residence. In fact, the law of the U.S. Supreme Court as adopted in Bohanaon read as follows:

> "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a **third person's premises** or

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[1] Also, as a matter of practice, Orders in forfeiture cases tend to be short.

property has not had any of his Fourth Amendment rights infringed." Rakas v. Illinois, 439 U.S. 128, 134, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (the U.S. Supreme Court case laying down the reasonable expectation of privacy test) cited in Bohanon, 251 Ga. App. at 772 (emphasis and parenthetical added).

Clearly, that case does not even really apply to the case *sub judice*.

Bohannon also relied upon an interpretation of how far a consent to search extended, and that the Claimant had disclaimed an ownership interest in the property. Here, there was no consent to search, and Mr. Stovall claimed an interest in the property. Furthermore, Mr. Stovall, as indicated above, has claimed standing on grounds beyond that of a mere bailee - the search was his home which was his castle. Bohannon merely stands for the proposition that if you do not have any other standing to contest a search (such as the privacy interest of your own home as **this** case has) then merely being a bailee alone will not give you standing to challenge the constitutionality of the search. Bohanon does *not* stand for the notion that a resident has no standing to contest the illegal search and subsequent seizure of his home and property.

Perhaps even more disturbing is the fact that Judge Bernes completely ignored other language in the holding of the case about illegal searches and motions to suppress. The Court of Appeals in Bohannon also held:

"When we review a trial court's decision on a motion to suppress, *the evidence is construed most favorably to uphold the findings and judgment of the trial court*. The trial court's findings on disputed facts and credibility are adopted unless they are clearly erroneous, and these findings will not be disturbed if there is any evidence to support them." State v. Diamond, 223 Ga.App. 164, 166, 477 S.E.2d 320 (1996), cited in Bohanon,251 Ga. App. 771 (emphasis added).

Apparently and unfortunately, the Court of Appeals selectively cited from their own precedent, ignoring the fact that Judge David Sweat's findings of fact should have been upheld - namely that the searches were illegal.

For all the reasons cited above, the Court of Appeals erred by allowing currency taken in an illegal search and seizure to be forfeited, where Mr. Stovall had clear standing as the the resident of the property illegally searched under all the above law, and especially the Constitutions of both the United States and of the State of Georgia, and its holding must be reversed, and the currency returned to Mr. Stovall.

II. THE COURT OF APPEALS COMMITTED ERROR BY MAKING FINDINGS OF FACT CONTRARY TO THAT OF THE TRIAL COURT JUDGE, IN VIOLATION OF THE ANY EVIDENCE RULE.

The Standard of Review for this enumeration of error, an issue of law, is de novo.

The Georgia Court of Appeals itself most recently stated the appropriate standard of review for bench trials (such as this one) where there are disputed material facts:

> "On appeal from a bench trial, we do not retry the case. Rather, the appellate standard of review for nonjury trials of disputed material facts is the **clearly erroneous test**, also known as the **"any evidence" rule**. As such, **the sole question for determination on appeal is whether there is any evidence to authorize the trial court's judgment. It is our duty to construe the evidence to uphold the judgment rather than upsetting it.** *This is true regardless of whether evidence also existed that may have supported the appellant's position.* In the absence of legal error, an appellate court is without jurisdiction to interfere with a judgment supported by some evidence." Sledge v. Peach County, --- S.E.2d ----, 2005 W.L. 3342089 (Ga. App. 2005), citing to Schowalter v. Washington Mut. Bank, 275

Ga. App. 182, 620 S.E.2d 437 (2005) (emphasis added). See also Bowens v. State, --- S.E.2d ----, 2005 W.L. 3006027 (Ga. App. 2005) (In ruling on a motion to suppress, the trial court sits as a trier of fact, and the court's findings are analogous to a jury verdict and will not be disturbed on appeal when the record contains any evidence to support those findings). The Georgia Supreme Court has also held the same rule to apply. General Motors Acceptance Corp. v. State, 279 Ga. 328, 613 S.E.2d 641
(2005). That case - *a forfeiture case* - holds:

> "The question of preponderance of the evidence is a matter resting with the trier of facts and where the trier finds either way, it will not be set aside on appeal if there is any evidence to support the finding." Id., citing Guye v. Home Indemnity Co., 241 Ga. 213, 218, 244 S.E.2d 864 (1978).

Guye reversed the Court of Appeals for failing to apply the any evidence standard when reviewing a finding of fact. See also White v. State, 258 Ga.App. 700, 574 S.E.2d 892 (2002) (a forfeiture case in which the Court of Appeals applied the any evidence rule as well). Consequently, there can be no doubt that the Georgia Court of Appeals was bound to apply the any evidence rule to the case *sub judice* on appeal.

However, the Georgia Court of Appeals clearly did not apply the any evidence rule to the case *sub judice*. For some unknown reason, and without explanation, the Court makes findings of fact contrary to findings of the trial Court, despite the clear evidence in the record to support them. The Court of Appeals erroneously made the following findings of fact, despite the fact that they were clearly supported by evidence in the Trial Court: 1) that Richardson had no standing as a bailor to contest the forfeiture of the currency; and 2) Stovall did not have standing as a bailee to contest the forfeiture.

A. Under the any evidence rule, there was at least some evidence to support the Trial Court's finding that Ms. Richardson was a bailor to the

U.S. Currency, and the Court of Appeals committed error by holding otherwise.

The Trial Court found that both claimants had a property interest in the subject matter of the condemnation proceeding. (R.149). Presumably, the Court found that Ms. Richardson was a bailor. Certainly the Court of Appeals seemed to read the opinion this way. It is well established, and the Court of Appeals acknowledges, that a bailor-bailee relationship is sufficient to confer standing. See Lawrence v. State, 231 Ga. App. 739, 740, 501 S.E.2d. 254 (1988). The Court of Appeals, in this case, held that there was no evidence to support the finding that the cash seized by law enforcement 12 months after it was initially given to Stovall by Richardson in April of 2002 was part of the same monies. However, as the Applicants now show, there was some evidence to support this finding of the Trial Court.

First of all, in his verified Answer Stovall did state that the funds seized by law enforcement were part of that same set of monies given to him in April 2002 for which he is a bailee. The Court of Appeals then states in its opinion that the verified Answer is really treated the same as an affidavit in a forfeiture hearing, and is non-probative hearsay and was inadmissible as a matter of law. It is true that a verified pleading *may* be treated as an affidavit for purposes of *summary judgment*. See Foskey v. Smith, 159 Ga. App. 163, 164, 283 S.E.2d. 33 (1981). Of course this case cited by the Court of Appeals is not exactly on point with the case *sub judice*, as it is not a summary judgment proceeding, and there is a different statute in operation here.

Sometimes, such as when an affiant is a mere witness, an affidavit may be hearsay when the other party objects. See Rokowski v. Gilbert, 275 Ga. App. 305, 620 S.E.2d 509 (2005) (cited in this case by the Court of Appeals as a blanket notion that affidavits are non-probative hearsay, despite the obvious factual difference between a mere affidavit and a verified pleading). Of course, in the case *sub judice*, the Answer was

verified and mandated by statute. There is no law that states that a verified answer in something other than summary judgment is treated as mere hearsay, especially where the State had the opportunity to subpoena Mr. Stovall and declined to do so, hence depriving themselves of the opportunity of cross examination. In fact, holding so is contrary to the clear legislative intent embodied in the creation of O.C.G.A. § 16-13-49, requiring a verified answer. The verified answer can substitute for the oath, and alleviates many of the concerns we normally have about hearsay. Consequently, the verified answer of Mr. Stovall provides at least some evidence in support of the Trial Court's conclusion that he is a bailee, and hence that Ms. Richardson is a bailor.[2]

But there is even more evidence. There is no doubt that at some point in time $15,000 was given from Ms. Richardson to Mr. Stovall for the purposes of a bailor bailee relationship. There is no doubt that the police (unlawfully) seized a large sum of money, over $10,000, from Mr. Stovall's residence, found in a safe where Ms. Richardson had previously seen the money deposited. (This is all in the opinion of the Court of Appeals). Based on this, and the lack of evidence from the State as to where else the money could have come from,[3] the

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Applicants would like to direct this Court to the case of Harrison v. Harrison, Ga. App. 578, 284 S.E.2d 83 (1981). In Harrison, ***the Court of Appeals did allow a verified traverse of a garnishment, essentially an answer, to stand as some evidence under an any evidence standard.*** Apparently, the Court there felt that a verified answer was at least some evidence, and that the Court of Appeals therefore could not disturb the trial court.

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Of course none of the alleged controlled substances or other evidence from the search is admissible, as stated above, so the state can not put on any evidence based on the searches, including alleged controlled substance transactions.

Trial Court made a finding of fact that the money was the same money Ms. Richardson had given to Mr. Stovall as a bailee. It was the duty of the Court of Appeals to construe the evidence to uphold the ruling of the trial court if at all possible, regardless of whether or not some other evidence may have existed to support the Appellant's position. Sledge, 2005 W.L. 3342089. Instead, the Court of Appeals impliedly found an alternative source for the money, using temporal evidence, and erroneously disturbed a finding of fact supported by at least some evidence in violation of the any evidence rule. This decision must be reversed, and the finding of the Trial Court as to Ms. Richardson's standing reinstated, and the money returned to her.

B. Under the any evidence rule, there was at least some evidence to support the Trial Court's finding that Ms. Richardson was a bailor to the U.S. Currency, and the Court of Appeals committed error by holding otherwise.

This argument goes very much the same as the above argument for Ms. Richardson. There was some evidence at the trial Court level, in the verified Answer, the testimony of Ms. Richardson, and the factual inferences that could be drawn from an unlawful search and seizure, that Mr. Stovall did indeed have the status of a bailee (with Ms. Richardson as the bailor) of the money. Mr. Stovall was able to show a purpose for the money, and Ms. Richardson offered credible, competent testimony that she had seen the money in the safe and had previously given him the large sum of money. Regardless of the personal opinions of the Court of Appeals as to this evidence, clearly it was some evidence to support the fining of the Trial Court.

Baker v. State would also seem to suggest that the facts here present some evidence in support of Mr. Stovall's claim. In that case, where there was only minimal evidence of how the

money was acquired, and no specific accounting, the forfeiture could not stand. This case is very similar to the case *sub judice*, and it is puzzling why the Court of Appeals would not at least distinguish the case if they felt it did not apply, given the evidentiary similarity. But unlike that case, in this case there was a clear, detailed source and legitimate use for the money. Hence, this case is an even cleared case where the forfeiture should not stand.

III. THE GEORGIA COURT OF APPEALS COMMITTED ERROR WHEN IT DECLINED TO RULE ON THE CONSTITUTIONALITY OF THE SEARCH AND SEIZURE, A MATERIAL ISSUE IN THE CASE, BEFORE REACHING THE ISSUE WHETHER OR NOT THE APPLICANTS HAD THE STATUS OF BAILOR AND BAILEE WITH REGARDS TO THE SEIZED U.S. CURRENCY.

The Standard of Review for this enumeration of error, an issue of law, is de novo.

Even if we are to assume that Applicants did not have the status of bailor and bailee, the Court of Appeals still put the cart before the horse by first deciding such status before determining if the search was constitutional or not. By failing to reach this inquiry, it can only by assumed that the decision of the Trial Court that the searches were illegal stands, yet the Court of Appeals relies on evidence from those findings, and also reaches a holding that can not be if the search was unconstitutional.

There is no clear explanation for the Court of Appeals deciding to not deal with the issue of the searches, except to conclude that the Court obviously felt they were unconstitutional, and that it didn't matter. As shown above, such is clearly not the case. In any case, the Court of Appeals committed error by declining to rule on the constitutionality of the searches, essentially allowing that decision to stand, and

then reaching a holding that was contrary to law based on the illegal searches. If nothing else, this Court should grant certiorari to clearly establish that the searches were illegal, and hence the evidence therefrom was inadmissible. Once that is decided, it will be clear that the forfeiture can not stand.

CONCLUSION

Applicants request this Court grant their Application for a Writ of Certiorari to the Court of Appeals.

This, the 28th day of December, 2005.

respectfully submitted,

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